* Together with American Life Insurance Co. v. Ora Inez Stewart et al.

No. 441

CLERK'S COPY.

No. 440

No. 441

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 440

THE AMERICAN LIFE INSURANCE COMPANY, PETITIONER,

vs.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED.

No. 441

THE AMERICAN LIFE INSURANCE COMPANY, PETITIONER,

vs.

ORA INEZ STEWART AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Equity. No. 713-N

THE AMERICAN LIFE INSURANCE COMPANY, a Corporation, Complainant,

vs.

REESE SMITH STEWART, JUNIOR, a Minor, et al., Defendants

Equity. No. 714-N

THE AMERICAN LIFE INSURANCE COMPANY, a Corporation, Complainant,

vs.

ORA INEZ STEWART et al., Defendants

BILL OF COMPLAINT—Filed September 3, 1932

In Equity. No. 713-N

Comes now The American Life Insurance Company, a corporation, of Denver, Colorado, and for its cause of action herein alleges and says:

1. That complainant is now and was at all times herein mentioned a corporation duly organized and existing under the laws of the State of Colorado, having its principal office and place of business in Denver, Denver County, Colorado, and is now and was at all of said times a citizen and resident of the State of Colorado; that Reese Smith Stewart, Junior, is a citizen and resident of Wichita, Sedgwick County, Kansas, and a minor of the age of 18 years, and the son of Reese Smith Stewart, deceased; that Ora Inez Stewart is (a) a citizen and resident of Wichita, Sedgwick County, Kansas, (b) the widow of Reese Smith Stewart, deceased, and the mother of Reese Smith Stewart, Junior (c) the duly appointed, qualified and acting guardian of

[fol. 2] the person and estate of Reese Smith Stewart, Junior, a minor, and (d) the duly appointed, qualified and acting executrix of the estate of Reese Smith Stewart, deceased; that Reese Smith Stewart died a citizen and resident of Wichita, Sedgwick County, Kansas, and said guardian and executrix was duly appointed and confirmed by the probate court of said county and state.

2. That this action is of a civil nature wherein the matter and amount in controversy exceeds, exclusive of interest and costs, the sum and value of Three Thousand ($3000) Dollars as hereinafter more fully set forth.

3. That on the 23rd day of February, 1932, complainant issued and delivered to Reese Smith Stewart a policy of life insurance bearing date of February 23, 1932, being policy No. 33954, by which in consideration of the application therefor and the payment by the said Reese Smith Stewart of the first annual premium of Three Hundred Forty-six Dollars and Fifty Cents ($346.50) and the further payment of a like sum annually thereafter during the continuance of said policy, it agreed to pay, subject to certain conditions and stipulations, upon due proof of the death of the said Reese Smith Stewart, the sum of Five Thousand ($5000) Dollars to Reese Smith Stewart, Junior, son of the insured and the duly designated beneficiary under said policy.

4. Complainant further alleges and states that said policy of insurance mentioned above was issued and delivered by it to said Reese Smith Stewart pursuant to a written application therefor, consisting of two parts, Part I thereof being dated February 11, 1932, and Part II thereof being dated February 18, 1932, each of said parts being executed by the said Reese Smith Stewart, said written application consisting of Parts I and II and the policy of insurance constituting the entire contract by and between the complainant and the insured, Reese Smith Stewart; that a true and correct photostatic copy of said policy, together with a true and correct photostatic copy of the application therefor, said application consisting of the said Parts I and II above referred to, and a copy of which was attached to said policy, is marked Exhibit A, attached hereto and made a part hereof.

That the said application, Part I, among other things contained the following questions to which Reese Smith Stewart, the applicant, afterwards the insured, made answers as set out after said questions as follows:

[fol. 3] Q. "6a. What Company, Society, Order or Agent ever declined or postponed your application for Life Insurance or offered you Life Insurance differing in form, amount or premium rate from that for which you applied?

A. "None.

Q. 6 "b. With what Companies, Societies or Orders have you an application for Life Insurance now pending?

A. "5000 N. Y. Life, 5000 Metropolitan, C. Letter attached." (For inspection.)

That a true and correct copy of the letter attached to said application and referred to in applicant's answer to question 6 "b" above set out is marked Exhibit B, attached hereto and made a part hereof.

Q. "10. In what Companies, Societies or Orders is your life now insured

A. Company M. W. A. and no others. Amount, 2000. Form of Policy. Year Taken 1900.

That in Part II signed by said Reese Smith Stewart and made a part of said contract of insurance, the said applicant was asked, among other things, the following questions, to which he made answer as set out after the questions as follows:

Q. "14. Name below all causes for which you have consulted a physician in the last ten years:

A. Illness, Influenza. Number of Attacks, 1. Date, Feb. 28. Severity and Duration, two weeks. Any Remaining Effects, No. Attending Physician's Name and Address, Dr. McComb, Wichita, Kas."

Q. "15. Are you now in good health, as far as you know and believe?

A. Yes.

Q. "16. Has any medical examiner or physician expressed an unfavorable opinion as to your insurability or health?

A. No."

Q. "22. Have you now, or have you ever had, any other diseases or any injury? Give details, dates, etc., of any history noted above:
A. No."

That said application Parts I and II were a part of said [fol. 4] contract and constituted the basis for the insurance of said policy of insurance and that the applicant represented therein in part that no insurance company, society or order or agent thereof had ever declined or postponed his application for life insurance or offered him life insurance differing in form, amount or premium rate from that for which he applied; that he did not have, at the time of making said application for insurance, any application for life insurance pending in any other company or companies excepting as set forth in said application; that said applicant in said letter referred to in said application and attached thereto as a part thereof implied thereby and represented therein that he would not accept more than one of the policies therein mentioned; that he had never been declined, postponed or limited by any life insurance company; that at the time of signing said application he only had life insurance in one company, society or order, to-wit, 2,000.00 in the "M. W. A."; that the only cause for which he had consulted a physician in the last 10 years immediately preceding the time that he executed said application was for one attack of influenza in February, 1928, the duration of which was tw- weeks and from which he sustained no remaining effects; that so far as he knew and believed he was then in good health; that no medical examiner or physician expressed an unfavorable opinion as to his insurability or health and that he did not then have and never had had any other disease or injury except the one attack of influenza in February, 1928, and that the answers set forth in said application were full, complete and true.

5. Complainant further alleges that each and all of said representations so made by the said Reese Smith Stewart in the application were knowingly and wilfully false; were fraudulently made by him; were material to the issuance of said contract of insurance; were made with the intent of deceiving the complainant in the issuance of said insurance; that said application formed the basis of the policy as applied for and was relied upon by the complainant in

the issuance thereof; that complainant relied upon said representations and was deceived thereby, and that but for such representations said policy would not have been issued; that complainant is informed and believes and therefore alleges it to be a fact that the application for life insurance of the said Reese Smith Stewart had been declined and/or postponed by other insurance companies and that applicant at said time had applications for life insur- [fol. 5] ance pending in insurance companies other than as set out in said application; that as a matter of fact applicant did receive and accept both policies mentioned in said letter attached to said application and referred to in answer to Question 6 "b" in Part I thereof: that applicant at said time had life insurance in excess of that indicated in said application; that applicant had suffered other attacks of illness within the period of ten years last preceding the time he signed said application for which he had consulted a physician, among which was a severe attack of influenza in December, 1928, for which he was under treatment by a physician for a period of several months and from which illness resulted numerous serious complications, among which were myocarditis and nephritis; that at said time said applicant was duly advised of his true physical condition by his attending physician; that complainant is informed and believes and alleges it to be a fact that said applicant during said illness beginning in December, 1928, suffered what is commonly called "a stroke" or "stroke of paralysis"; that at the time of signing said application, said applicant was not in good health but was then and for a considerable period of time prior thereto had suffered from a complication of diseases, the full extent of which complainant does not at this time know, but that his heart, kidneys and limbs were seriously affected and diseased, all of which was fully known by said applicant at the time he signed said application.

6. That relying upon the statements made in said application and in total ignorance of the facts so suppressed and concealed, complainant issued its policy of insurance as aforesaid; that but for said misrepresentations and concealments said policy would not have been issued; that each of the statements and representations made by the said Reese Smith Stewart being false and fraudulent in character became operative upon the issuance of said policy of in-

surance as a warranty and condition on the part of the said Reese Smith Stewart that each of said statements and representations were as a matter of fact true.

7. That each and all of said representations were material to the risk of insurance upon the life of the said Reese Smith Stewart and each and all of said representations aforesaid made by the insured were knowingly false and untrue in material parts; that had each and all of the facts been disclosed to complainant, they would have affected its [fol. 6] action in passing upon said application for insurance; that the facts aforesaid so misrepresented to complainant and fraudulently concealed from it actually contributed to the death of the said Reese Smith Stewart which occurred on or about May 31, 1932.

8. That the said policy contains a clause in words and figures as follows, to-wit:

"Incontestability: This policy shall be incontestable, except for non-payment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue, except as to provisions and conditions (if any) relating to benefits in event of total and permanent disability and those granting additional insurance against death by accident."

That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity.

9. Complainant further alleges that it has received the first annual premium upon said policy which was required to be paid at the time of the issuance of said policy, the amount of said premium being Three Hundred Forty-Six Dollars and Fifty Cents ($346.50); that said premium was paid as follows: That complainant's soliciting agent who obtained said application, one Roy H. Otto, at the time of taking the same also took said Reese Smith Stewart's application for another policy of the same kind and for the same amount, to-wit, Five Thousand ($5000) Dollars, naming as beneficiary in said other policy his wife, Ora Inez Stewart; that the said application was made for the purpose of ob- [fol. 7] taining and as the basis for the issuance of both of said policies; that both of said policies were issued to the said applicant; that at said time said Otto, who no longer represents this complainant in any capacity whatsoever, took one certain promissory note duly executed by the said applicant, dated February 28, 1932, in the amount of Six Hundred Ninety-three ($693) Dollars, or the total amount of the first annual premium on each of said policies, said note bearing interest at the rate of six per cent per annum from date; that said Otto then forwarded to complainant its net portion of the premiums on each of said policies, which was One Hundred Seventy-three Dollars and Twenty-five Cents ($173.25) in each instance, or a total of Three Hundred Forty-six Dollars and Fifty Cents ($346.50) and retained said note; that said Otto took said note and extended credit to said applicant as aforesaid, by an agreement entirely between himself and said applicant, all of which was unknown to complainant at said time; that payment of said premium as aforesaid was made and complainant received its net portion thereof before it had any knowledge of the false and fraudulent statements and representations herein set forth or any of them; that after ascertaining the facts as herein alleged with respect to said false and fraudulent statements, complainant discovered the facts concerning said note and it thereupon made inquiry as to the whereabouts of said note, and being informed that said Otto still held said note went to him for the purpose of taking up said note in order to be in position to cancel and tender the same to the defendants herein and Ora Inez Stewart; that said Otto informed complainant that he owned said note and that it was wholly un-

paid save and except Two Hundred ($200) Dollars which was paid by Ora Inez Stewart on July 19, 1932, and which amount was applied on said note. Complainant thereupon attempted to purchase said note from said Otto for the purpose above set forth, and tendered him in cash the unpaid balance of the principal thereon, to-wit, Four Hundred Ninety-three ($493) Dollars, together with all accrued interest thereon, amounting in all to Five Hundred Eleven Dollars and Ten Cents ($511.10); that said Otto refused to accept said tender and/or to sell or deliver said note to complainant; that after using due diligence to obtain possession of said note and being unable to obtain the same, complainant did prior to the commencement of this action duly tender to the defendants herein and each of them in [fol. 8] cash the unpaid balance of the principal of said note with the accrued interest on said note in the total amount of Five Hundred Eleven Dollars and Ten Cents ($511.10), and in addition thereto in cash Two Hundred One Dollars and Fifty-three Cents ($201.53), said last mentioned amount being the installment of principal paid upon said note on July 19, 1932, as aforesaid, with interest on said sum at the rate of six per cent per annum from said date; that all together said complainant tendered to said defendants the total sum of Seven Hundred Twelve Dollars and Sixty-three Cents ($712.63) representing the entire outstanding obligation of said note together with the amount with interest paid thereon by said Ora Inez Stewart, and at the time of said tender complainant notified said parties and each of them that it had elected to cancel and rescind and did cancel and rescind said policy of insurance on account of said fraud and misrepresentations in procuring the same; that said parties and each of them refused to accept the sum of money so tendered and that complainant has since said time kept and held said tender open and has been at all times since said tender and is now ready, willing and able to tender said sums as aforesaid, and complainant now offers and tenders and avers its willingness to deposit said sum, to-wit, Seven Hundred Twelve Dollars and Sixty-three Cents ($712.63), with the clerk of this court for the use and benefit of the parties entitled thereto and upon the entry by the court of an order permitting and directing complainant so to do. Complainant further alleges in this connection that it stands ready, willing and able at all times

to take up said note by paying the full value thereof, and to cancel the same and tender said cancelled note to said parties as aforesaid, and to otherwise do equity in that regard.

Wherefore, in consideration hereof, and inasmuch as complainant is without adequate remedy at law in the premises and cannot have equitable relief save in a court of equity where matters of this and a similar nature are properly cognizable, complainant prays that it may have judgment against the defendants and for a decree declaring the said contract of insurance, being policy No. 33954 heretofore issued by complainant upon the life of the said Reese Smith Stewart, to be null and void and of no force and effect and that said policy shall be cancelled, set aside and terminated, and that defendants be required to surrender the same into [fol. 9] court, and for such other and further relief as to the court may seem just, proper and equitable.

R. R. Vermilion, Earl W. Evans, Joseph G. Carey, W. F. Lilleston, George Spradling, Henry V. Gott, Attorneys for Complainant.

Duly sworn to by V. L. Tickner. Jurat omitted in printing.

EXHIBIT "A" TO BILL OF COMPLAINT—Page One

Incorporated as a Legal Reserve Stock Company under the Laws of the State of Colorado

Amount $5000.00. Number 33954.

The American Life Insurance Company

Denver, Colorado

Annual Premium $346.50. Age 63.

Hereby Agrees to Pay the sum of Five Thousand Dollars at the Home Office of the Company, Denver, Colorado, immediately upon receipt of due proof of the death of Reese Smith Stewart, the Insured, of Wichita, State of Kansas, and of satisfactory proof of interest of the claimant, to Reese Smith Stewart, Junior, His Son, hereinafter referred to as the Beneficiary with the right reserved by

the Insured to revoke and change any Beneficiary in accordance with the provisions of the Policy.

[fol. 10] The Guaranteed Cash Surrender Value of this Policy at the end of the twentieth year will be $3070.00, if all premiums have been paid in full and if there be no outstanding indebtedness against the Policy.

The conditions, benefits and privileges contained in the following pages form a part of this contract, as fully as if recited over the signatures hereto affixed, and the Policy is issued by the Company and accepted by the parties in interest subject thereto.

The Consideration for This Policy is the application therefor, a copy of said application being attached hereto when issued, and the payment in advance of an annual premium of Three Hundred Forty-six and 50/100 Dollars for the advance reserve required by law hereon and for one year's term insurance for the year beginning on the Twenty-third day of February, 1932, and the further payment of a like amount annually thereafter during the continuance of this contract.

In Witness Whereof, The American Life Insurance Company has caused this Policy to be signed by its President and its Secretary this Twenty-third day of February, 1932.

J. C. Burger, President.

Attest: M. K. Roach, Assistant Secretary.

Life Policy. Non-Participating.

NMB. Premiums Payable for Life.

Exhibit A—Page Three

Conditions, Benefits and Privileges

Policy Contract: This policy and the application therefor, taken together, constitute the entire contract between the parties hereto. No change or modification may be made, nor shall any forfeiture be waived or the date of payment of any premium be changed, except by consent of the Company duly recorded by written endorsement hereon over the signature of its President or Secretary.

Policy When in Effect: This policy shall not take effect until the first premium hereon is paid during the lifetime and good health of the Insured.

Payment of Premiums: All premiums are due and payable in advance at the Home Office of the Company in the

[fol. 11] City of Denver, Colorado, or to a designated collector on or before date due, but in any case only in exchange for the Company's receipt therefor, signed by the President, Secretary or Treasurer of the Company and countersigned by such collector. Upon default in payment of any premium, or any note or interest thereon, whether such note be given for the first or subsequent premium, this policy shall be null and void and all premiums forfeited to the Company, except as herein provided. After the first policy year, premiums may be paid in advance in semi-annual or quarterly installments at the Company's rates therefor, and such semi-annual premiums shall be fifty-two per cent and such quarterly premiums shall be twenty-six and one-half per cent of any annual premium payable hereunder, but except as herein provided, the payment of any premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

Grace in Payment of Premiums: A grace of thirty-one days (without interest) will be granted for the payment of every premium or installment thereof after the first premium during which time this policy shall remain in force.

Agents Authority Limited: Agents have no authority to either extend the time for the payment of a premium, or of interest, or to make, alter, or discharge a contract, or to waive a forfeiture, or to bind the Company by any statement or promise.

Reinstatement: At any time after any default in premium payment, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company, this policy, unless previously surrendered for its cash value, may be reinstated upon the payment of arrears of premiums with compound interest thereon at the rate of six per cent per annum, and the payment or reinstatement of any indebtedness to the Company existing at the date of such default with interest from that date.

Rights of the Insured: This policy is issued with the express understanding that the Insured may, without the consent of the Beneficiary, unless irrevocably designated, receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this policy, subject to the rights of the Assignee, if any.

[fol. 12] Statements Are Not Warranties: All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement made by the Insured shall avoid this policy unless it is contained in the written application therefor, copy of which is attached hereto. No action at law or suit in equity shall be commenced or maintained hereon, nor recovery had, unless such action or suit is commenced within five years after the cause of action shall accrue.

Misstatement of Age: If the age of the Insured has been misstated, the amount payable hereunder shall be such a sum as the premium actually paid would have purchased at the correct age.

Incontestability: This policy shall be incontestable, except for non-payment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue, except as to provisions and conditions (if any) relating to benefits in event of total and permanent disability and those granting additional insurance against death by accident.

Suicide and First Year Restrictions: If the Insured shall die either in consequence of engaging in an aerial flight, or while in or on a submarine, or by his own hand or act, whether sane or insane, or as a result of a penalty prescribed by law within one year from the date hereof, the liability of the Company shall be limited to the amount of the premiums actually paid hereon..

Assignment: No assignment of this policy shall be binding upon the Company until the original, or a duplicate thereof, is filed with the Company at its Home Office. The Company will not assume any responsibility for the validity of any assignment and any claim hereunder by an assignee shall be subject to proof of interest and extent thereof.

Indebtedness: Any indebtedness to the Company on account of or secured by this policy (including any unpaid portion of the premium for the policy year current at death) will be deducted in any payment or payments or in any settlement under this policy.

Proofs of Death: Proofs of the death of the Insured, and [fol. 13] of the interest of the Claimant, must be furnished to the Company at its Home Office.

Change of Beneficiary: Subject to the rights of any Assignee, the Insured (1) may designate one or more Bene-

ficiaries if none be named herein, either with or without reservation of the right to revoke such designation; and (2) may designate one or more contingent Beneficiaries whose interest shall be as expressed in or by the endorsement of the Company on this policy; and (3) may change any Beneficiary not irrevocably designated; and (4) may change any contingent Beneficiary. If there be more than one Beneficiary the interest of any deceased Beneficiary shall pass to the surviving Beneficiary or Beneficiaries, unless otherwise directed by the Insured. The contingent Beneficiary or Beneficiaries, if any, shall, upon satisfactory proof of the death of the last surviving Beneficiary, succeed to all the interest, rights and privileges of which such Beneficiary died possessed, unless otherwise directed by the Insured. If no Beneficiary or contingent Beneficiary survives the Insured, the proceeds of this policy shall be payable to the executors, administrators, or assigns of the Insured. No such designation, revocation, change or direction shall be effective unless duly made in writing and filed at the Home Office of the Company (accompanied by this policy for suitable endorsement) prior to or at the time this policy shall become payable.

EXHIBIT "B" TO BILL OF COMPLAINT

Wichita, Kansas, February —, 193-.

American Life Insurance Co., Denver, Colorado

GENTLEMEN:

This application for Mr. Stewart, Mr. Stewart made application to N. Y. Life and Metropolitan for $5,000 O. L. with the understanding he would take the policy that suited him best. Both contracts were issued as applied for. In the meantime he learned Roy Otto was with us, and was anxious to give Roy the business if he could, so I assured him it was perfectly alright as he had not taken either contract and had made no settlement and as our rate was lower it was good business on his part. Otto's and Stewarts have been friends for years. Thinking perhaps the report

[fol. 14] might show these two contracts, I think this explanation is necessary.

Respectfully yours, Gradley-Parfet Agency, by D. M. Parfet.

[File endorsement omitted.]

[Subpœnas in Equity, with marshal's returns showing service upon the defendants in each case, were filed in the District Court on Sept. 10, 1932.]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed September 26, 1932

In Equity. No. 713

Now come the Defendants Reese Smith Stewart, Junior, a minor, Ora Inez Stewart, guardian of Reese Smith Stewart, Junior, a minor, and Ora Inez Stewart as executrix of the estate of Reese Smith Stewart, deceased, and severally move the court to dismiss the Bill of Complaint herein, upon the following grounds:

1. It appears from the face of the Bill herein that said Bill does not state facts sufficient to constitute a valid cause of action in equity against these Defendants, severally or jointly.

2. It appears from the face of the Bill herein that said Bill of Complaint does not set forth facts sufficient to constitute a cause of action at law or in equity against said Defendants Reese Smith Stewart, Junior, a minor, Ora Inez Stewart, guardian of Reese Smith Stewart, Junior, a minor and Ora Inez Stewart as executrix of the estate of Reese Smith Stewart, deceased, or against either of them.

3. It appears from the face of the Bill herein that Complainant is not entitled to the relief prayed for in said Complaint against these Defendants nor to the relief arising from the facts alleged in said Complaint as said Complain-

ant has shown by said allegations a complete and adequate remedy at law.

Wherefore Defendants pray that the whole of the Bill of [fol. 15] Complaint may be dismissed and that they may be hence dismissed with their costs; and for such other and further relief as to the court may seem just.

Dated, Wichita, Kansas, September 26th, 1932.

William Keith, Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BILL OF COMPLAINT—Filed October 27, 1932

In Equity. No. 713-N

Now comes The American Life Insurance Company, the plaintiff in the above entitled cause, and moves this court for leave to file a supplemental bill of complaint, a copy of which is hereto annexed, in the above entitled cause, and says:

1. On the 3rd day of September, 1932, plaintiff filed its bill of complaint in this court against the above named defendants, asking for a decree cancelling, setting aside and holding for naught a certain policy of life insurance bearing number 33954 issued by plaintiff upon the life of Reese Smith Stewart, in the amount of $5,000.00, because of fraud and misrepresentation of the insured in procuring said insurance, and for the surrender of said policy.

2. Thereafter and on the 26th day of September, 1932, the defendants filed a motion to dismiss said bill of complaint, asking that said bill of complaint be dismissed for the reason that the facts therein set forth were insufficient to constitute a cause of action in equity against the defendants herein or either of them and that the facts so alleged in said bill showed on their face that plaintiff had an adequate remedy at law; that said motion is still pending and undetermined.

3. That since the filing of said bill of complaint in this suit and after each and all of the defendants herein had been duly served with subpœnas herein, and on the 11th day of October, 1932, said Reese Smith Stewart, Junior, filed in this court, by Ora Inez Stewart, his guardian, an action at law which is now pending before this court, being entitled Reese Smith Stewart, Jr., a minor, by Ora Inez Stewart, Guardian, Plaintiff v. The American Life Insurance Com-
[fol. 16] pany, a corporation, Defendant, and numbered 1398, wherein he seeks to recover the face value of said policy number 33954 in the amount of $5,000.00 together with interest thereon.

R. R. Vermilion, Earle W. Evans, Joseph G. Carey, W. F. Lilleston, George C. Spradling, Henry V. Gott, Attorneys for Plaintiff.

In United States District Court

Supplemental Bill of Complaint—Filed October 27, 1932

Plaintiff, The American Life Insurance Company, brings this, its supplemental bill of complaint herein, by leave of court first had and obtained, against the defendants herein, and says:

Since the filing of the original bill of complaint herein, the following material facts have occurred, viz.: The defendant herein, Reese Smith Stewart, Junior, a minor, after all of the defendants herein had been served with subpœnas and after due return of such service had been duly filed herein, and on the 11th day of October, 1932, by Ora Inez Stewart, his guardian, filed an action at law in this court, which is now pending before this court, being entitled Reese Smith Stewart, Jr., a minor, by Ora Inez Stewart, Guardian, Plaintiff, vs. The American Life Insurance Company, a corporation, Defendant, and numbered 1398, wherein he seeks to recover the face value of a policy of life insurance bearing number 33954 in the amount of $5,000.00 together with interest thereon, which is one and the same identical policy of insurance that plaintiff in this equitable action is seeking to have cancelled, set aside and held for naught because of fraud and misrepresentation of Reese

Smith Stewart, the insured in said policy, in procuring said insurance.

That said Reese Smith Stewart, Jr., is threatening to and will, if not enjoined and restrained therefrom, prosecute said legal action prior to the determination and entry of final decree in this action, and said Reese Smith Stewart, Jr. should be enjoined and restrained from proceeding with the prosecution of said legal action until after the determination of and entry of final decree in this equitable action. [fol. 17] Wherefore, plaintiff prays that the said Reese Smith Stewart, Jr., plaintiff in said action at law, be enjoined and restrained from further prosecuting said legal action until this cause has been finally determined and final decree entered herein, in addition to the relief prayed for in the original bill herein.

R. R. Vermilion, Earle W. Evans, Joseph G. Carey, W. F. Lilleston, George C. Spradling, Henry V. Gott, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL BILL OF COMPLAINT—Filed October 29 1932

This cause came on to be heard at this term, upon plaintiff's application for leave to file a supplemental bill of complaint herein, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, Adjudged and Decreed that plaintiff be and it hereby is granted leave to file said supplemental bill of complaint, and shall within three days from the entry of this order serve a copy thereof upon the attorney for the defendants.

Dated this 29th day of October, 1932.

Richard J. Hopkins, District Judge.

Approved: Vermilion, Evans, Carey & Lilleston, by Henry V. Gott, Attorneys for Plaintiff; William Keith, Attorney for Defendants.

[File endorsement omitted.]

2—440–441

IN UNITED STATES DISTRICT COURT

NOTICE OF APPLICATION FOR RESTRAINING ORDER AND INJUNCTION—Filed March 3, 1933

In Equity. No. 713-N

To William Keith, Attorney of Record for the Defendants Herein:

Please take notice that on the 13th day of March, 1933, at ten o'clock A. M. or as soon thereafter as counsel can be heard, we will present before Honorable Richard J. Hop-
[fol. 18] kins, Judge of this Court, at the United States court house in the city of Wichita, Kansas, the application of plaintiff for a restraining order and injunction as prayed for in the bill and supplemental bill in this cause.

Dated at Wichita, Kansas, this 3rd day of March, A. D. 1933.

R. R. Vermilion, Earle W. Evans, Jos. G. Carey, W. F. Lilleston, George C. Spradling, Henry V. Gott, Solicitors for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUBMITTING MOTION TO DISMISS ON BRIEFS—Filed March 22, 1933

Equity. 713-N

This suit came on for hearing at Wichita in said District on March 16, 1933, on defendants' motion to dismiss the bill for want of equity, and on the application of complainant for an order enjoining and restraining defendants from further prosecuting their action at law, to-wit, Law action No. 1398, entitled Reese Smith Stewart, Jr., a minor, et al, vs. The American Life Insurance Company, a corporation, pending in this court, until this suit be finally determined. The parties appeared by their respective counsel, and on consideration thereof,

It Is By the Court Ordered as follows:

1. That the motion to dismiss for want of equity stand submitted and that defendants have 10 days within which to file their citations or brief in support thereof, and that complainant have 15 days within which to file its citations or brief. That defendants have 5 days thereafter in which to file a reply brief or citations, if desired.

2. That consideration of the matter of injunctive relief prayed by complainant in its original and supplemental bill be deferred until the court shall have ruled on the motion of defendants to dismiss for want of equity and if same be overruled prompt hearing be had thereon.

Richard J. Hopkins, Judge.

[fol. 19] Approved: Vermilion, Evans, Carey, Lilleston, Attorneys for Complainant; William Keith, Attorney for Defendants.

[File endorsement omitted.]

In United States District Court

Consent to Amend Original Bill of Complaint—Filed July 31, 1933

Equity. 713-N

Come now the defendants by their attorney William Keith and consent to complainant amending its original bill of complaint by attaching thereto a verification, copy of which is marked Exhibit A and attached hereto.

Dated at Wichita, Kansas, this 31st day of July, 1933.

William Keith, Attorney for Defendant.

Exhibit "A" to Consent

State of Colorado,
County of Denver, ss:

V. L. Tickner, being duly sworn, says that he is Vice President and General Manager of The American Life In-

surance Company, a corporation, the plaintiff in the foregoing bill, and knows the contents thereof; and that the same is true to his own knowledge, except as to matters that are stated therein to be alleged on information and belief, and as to those matters he believes it to be true.

V. L. Tickner.

Subscribed and sworn to before me by V. L. Tickner on this the 8th day of March, A. D. 1933. My commission expires December 17, 1936. A. Genevieve Auril, Notary Public, Denver County, Colorado. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS—Filed August 2, 1933

Equity. 713-N

Now on this 28th day of July, 1933, this cause comes on for ruling on the motion of the defendants to dismiss the bill for want of equity, said motion having been heretofore presented by counsel for respective parties on both oral arguments and written briefs, and the court having duly [fol. 20] considered said oral arguments and written briefs and being well advised in the premises finds that said motion should be overruled. To which finding defendants duly excepted.

It Is Therefore By the Court Ordered, that said motion should be and is overruled. To which order defendants duly excepted.

It Is Further Ordered that the defendants be given 10 days in which to file their answer.

Richard J. Hopkins, Judge.

Approved: V. E. C. & L. Vermilion, Evans, Carey & Lilleston, Attorneys for Complainant; William Keith, Attorney for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO TRIAL—Filed August 29, 1933

In Equity. No. 713

Whereas, The American Life Insurance Company, Complainant herein, on September 3, 1932, filed its bill of complaint against the defendants herein for the recision and cancellation of a policy of life insurance issued to Reese Smith Stewart, now deceased, said policy being in the amount of Five Thousand ($5,000.00) Dollars and Numbered 33954, and said defendants heretofore and in due time filed a motion to dismiss said bill of complaint, which motion was, after presentation to and due consideration by the court, overruled and defendants have filed their answer to said bill of complaint, and

Whereas, on October 11, 1933, said defendants filed an action at law in this court for the recovery of the proceeds of said policy of life insurance, said action being Number 1398 and styled; "Reese Smith Stewart, Junior, a minor, et al, Plaintiff, vs. The American Life Insurance Company, a corporation, Defendant", in which said insurance company in due time filed a motion to stay proceedings therein until the suit in equity was finally determined, said insurance company having in the meantime filed its supplemental bill of complaint setting up the filing of said law action and thereafter made application for an order restraining and enjoining all further proceedings in said law action [fol. 21] pending the final determination of the suit in equity, and which motion and application are still pending and undetermined,

Now, Therefore, in order to expedite the decision of the matters in controversy, the parties hereto, subject to the approval of the court, stipulate and agree:

That the suit in equity shall be tried to the court before said law action is tried, Provided, However, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.

It is further agreed by the parties hereto that if this stipulation meets with the approval of the court, that a stipu-

lation and agreement to the same effect shall be entered in said law action.

It is further agreed that if this stipulation does not receive the approval of the court, that then and in that event Complainant's application for an order restraining and enjoining further proceedings in said law action shall be presented to the court as soon as it will hear the same.

Dated at Wichita, Kansas, this 29th day of August, 1933.

Vemilion, Evans, Carey & Lilleston, Solicitors for Complainant. William Keith, Solicitor for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ON STIPULATION AS TO TRIAL—Filed August 31, 1933

A written stipulation which has been entered into by the parties hereto and dated August 29, 1933 and filed herein has on this 31st day of August, 1933, been presented to the court at Chambers at Topeka, Kansas, for approval, and the court, after due consideration of said stipulation and being well advised in the premises, approves said stipulation.

It Is Therefore By the Court Ordered, That said suit in [fol. 22] equity shall be tried to the court before said law action in said stipulation mentioned, Provided, However, that the issues in said law action shall be made up in order that said law issues thus joined shall stand ready for trial and said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.

It is further Ordered that a copy of said stipulation and a copy of this order shall be filed and entered in said law action.

Richard J. Hopkins, Judge.

Approved: Vermilion, Evans, Carey & Lilleston, Solicitors for Complainant; William Keith, Solicitor for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR FURTHER AND BETTER STATEMENT—Filed October 10, 1933

In Equity. No. 713-N

Comes now the plaintiff, The American Life Insurance Company, and moves this court, pursuant to the provisions of equity rule 20, that the defendants be ordered to furnish further and better particulars of the matters stated in the amended answer herein filed on the 10th day of October, 1933, in the following respects:

In paragraph 4 of said amended answer to state the exact answers to the questions in said application alleged to have been given to the soliciting agents and medical examiner of the complainant, by Reese Smith Stewart, the applicant, which defendants allege were not fully or correctly recorded in said application by said soliciting agents and medical examiner.

The complainant further moves that an order be entered that the defendants file such particulars and serve upon it a copy of the same within — days after the entry of said order.

Dated October 10, 1933.

Henry V. Gott, Vermilion, Evans, Carey & Lilleston,
Solicitors for Complainant.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF REESE SMITH STEWART, JUNIOR, A MINOR, ORA INEZ STEWART, GUARDIAN OF REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED—Filed October 10, 1933

In Equity. No. 713

Comes now Reese Smith Stewart, Junior, a minor, Ora Inez Stewart, as Guardian of said Reese Smith Stewart, Junior, and Ora Inez Stewart, as Executrix of the estate

of Reese Smith Stewart, deceased, and by leave of court and consent of plaintiff, file herein their joint and several amended answer to the amended bill of complaint in the above entitled cause as follows:

1. Answering the first paragraph of the bill of complaint, defendants admit all the averments contained therein.

2. Defendants admit the averments of the second paragraph of the bill.

3. Defendants also admit all the averments contained in the third paragraph of said bill.

4. Answering the allegations contained in the paragraph of said bill of complaint numbered four (4), defendants admit that the policy of insurance involved in this action was issued and delivered by complainant to said Reese Smith Stewart pursuant to a written application therefor, consisting of two parts, Part One thereof being dated February 11, 1932, and Part Two thereof being dated February 18, 1932, and that each of the said parts contained the signature of said Reese Smith Stewart, as applicant, and that a true and correct photostatic copy of said policy and of copies of said application therefor as attached to said policy, delivered to said Reese Smith Stewart, as aforesaid, is attached to complainant's bill marked "Exhibit A"; and on information and belief, defendants deny each and every other allegation contained in the said fourth (4th) paragraph of said bill of complaint.

Further answering the allegations contained in said paragraph numbered four (4) in the complaint, defendants allege that plaintiff has waived and ought not to be admitted to set up or rely upon the alleged misstatements referred to in said paragraph four (4) of its complaint, in avoidance of its liability in the premises and that plaintiff is estopped [fol. 24] to insist that the said representations of the insured were untrue or that there has been a breach of warranty in the premises—for the reason that the application referred to in said paragraph four (4) was taken, prepared and transmitted to plaintiff company for its approval or rejection by plaintiff's duly authorized soliciting agents, D. N. Parfet and Roy H. Otto, and that said Reese Smith Stewart gave full and true answers to the said soliciting agents to all questions propounded to him by said agents

and contained in said application, and that said agents were fully and completely informed thereto, but by their negligence, inadvertance, or mistake, said soliciting agents failed to fully or correctly record in said application, the answers given by said applicant to the questions so propounded to him.

5. Answering the allegations contained in the paragraph of said complaint numbered five (5), defendants on information and belief, deny each and every allegation contained in the said fifth (5th) paragraph of said bill of complaint.

6. Defendants also on information and belief deny each and every allegation contained in the paragraph of said bill of complaint numbered six (6).

7. Defendants likewise, on information and belief, deny each and every allegation contained in the paragraph numbered seven (7) in said bill of complaint.

8. Defendants admit that the policy issued and delivered to the said Reese Smith Stewart, as aforestated, contained an "Incontestability Clause" as set forth in paragraph numbered eight (8) in complainant's bill of complaint herein, but defendants deny any knowledge or information sufficient to form a belief as to any of the other allegations contained in said paragraph eight (8).

9. As to the matters alleged in paragraph nine (9) of said bill of complaint, such matters are immaterial to this cause, except complainant's averments that premiums due on said policy at the time of the death of said Reese Smith Stewart had been fully paid, and that complainant had received its share of said premiums from its agents and representatives, and that complainant has duly tendered defendants the full amount of said premiums so paid, with legal interest thereon, as a condition precedent to the maintenance of this action, and for that reason defendants make no answer thereto, except to admit the payment of said pre-
[fol. 25] miums and complainant's offer to return them as alleged in said paragraph of the bill of complaint.

10. Defendants deny each and every allegation in the bill not herein admitted, controverted or specifically denied.

Wherefore, these defendants having fully answered to the said bill of complaint in so far as they are advised the same is material and necessary to be answered unto, deny that the said complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, or any relief whatsoever and pray to be hence dismissed with their reasonable charges in this behalf most wrongfully sustained.

William Keith, Attorney for Answering Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER CONSOLIDATING FOR THE PURPOSE OF TRIAL EQUITY CAUSES NUMBERED 713-N AND 714-N—Filed October 10, 1933

On this 5th day of October, 1933, the motion of the complainant in each of the above entitled causes, for consolidation for the purposes of the trial of the said above entitled two causes, came on to be heard; and on inspection of the record and the complainant and defendants in both of said causes appearing by their attorneys and consenting, it is therefore

Ordered that said two causes be and they hereby are consolidated for the purpose of trial, under the title of The American Life Insurance Company, a corporation, Complainant, v. Reese Smith Stewart, Junior, a minor et al. Defendants, In Equity No. 713-N, and The American Life Insurance Company, a corporation, Complainant, v. Ora Inez Stewart, et al, Defendants, In Equity No. 714-N, Consolidated.

Richard J. Hopkins, Judge.

Approved: Vermilion, Evans, Carey & Lilleston, Solicitors for Complainant; William Keith, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

DEFENDANTS' FURTHER AND BETTER STATEMENT ORDERED FILED HEREIN, OCTOBER 10, 1933—Filed October 12, 1933

Now come the defendants in the above entitled actions and in compliance with the order made and entered in said actions on the 10th day of October, 1933, state:

That the applicant, Reese Smith Stewart, made the following answers to the questions quoted and set forth in paragraph numbered four (4) in the bill of complaint filed herein, and referred to in paragraph numbered four (4) in said defendants amended answer to said bill of complaint, to-wit:

In Part I of said application, to D. M. Parfet and Roy H. Otto, complainant's soliciting agents:

Question 6 b. "With what Companies, Societies or Orders have you an application for life insurance now pending?"

Answer. "5000, New York Life Insurance Company. 5000, Metropolitan Life Insurance Company."

Question 10. "In what Companies, Societies or Orders is your life now insured?"

Answer. "Company, Modern Woodmen of America. Amount, $2000. Form of Policy, Mutual-Fraternal. Year Taken, 1900. Company, Prudential Life Ins. Amount, $10000. 10 Yr. Policy. Form of Policy, Term policy issued Oct. 7, 1921, term converted to straight life January 14, 1929. Company, Prudential Life Ins. Amount, $2000. Form of Policy, Double Indemnity. Year Taken, Applied for Dec. 31, 1931, issued Jan. 4, 1932."

And in Part II in said application, to O. C. McCandless, complainant's medical examiner,

Question 14. "Name below all causes for which you have consulted a physician in the last 10 years."

Answer. "Illness Influenza. No. of Attacks, 1. Date, Feb. 28, 1929. Severity and Duration, 2 weeks. Any remaining effects? No. Attending physician's name and address, Dr. F. J. McComb, Wichita, Kansas."

William Keith, Attorney for Defendant.

[fol. 27] Copy of the foregoing served on us this 12th day of October, 1933.

Vermilion, Evans, Carey & Lilleston, Attorneys for Complainant.

[File endorsement omitted.]

In United States District Court

Order of Submission—Filed January 9, 1934

Now on this 3rd day of January, 1934, the above cases (consolidated) having been heretofore assigned for trial on this date, came regularly on for trial before the court; plaintiff appearing by its attorneys, Vermillion, Evans, Carey & Lilleston by Joseph G. Carey and Henry V. Gott, and defendants appearing by their attorney, William Keith. Whereupon said parties announce themselves ready for trial, and with the usual adjournments and continuances said trial proceeded before the court as follows: Counsel for the respective parties made their opening statements, whereupon plaintiff introduced its evidence and rested; thereafter defendants introduced their evidence and rested.

And now on this 4th day of January, 1934, the introduction of evidence having been concluded and the parties having rested,

It Is by the Court Ordered:

1st. The cases stand submitted.

2nd. The parties are ordered to file briefs in support of their respective contentions, as follows: Plaintiff is given fifteen days from the date it receives from the reporter of this court a transcript of the evidence, in which to file its brief and serve a copy thereof upon counsel for the defendants; defendants are given ten days after receipt of a copy of plaintiff's brief in which to file their brief and serve a copy thereof upon counsel for plaintiff, after which plaintiff is given five days, if it so desires, in which to file it reply brief and serve copy thereof upon counsel for defendants.

3rd. The parties shall file with their respective briefs their suggested findings of fact and conclusions of law.

Richard J. Hopkins, Judge.

[fol. 28] Approved: Vermilion, Evans, Carey & Lilleston, Attorneys for Plaintiff. William Keith, Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST FOR FINDINGS OF FACT NOS. 6-7-9-10-11-12-17-19-20—Filed April 23, 1934

The defendants request the court to make and return Findings of Fact and Conclusions of Law herein as follows:

Findings of Fact

VI

That the policies issued and delivered the insured, Reese Smith Stewart on the application complained of herein contains the following condition:

"Statements are not Warranties: All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement made by the Insured shall avoid this policy unless it is contained in the written application therefor, copy of which is attached hereto. No action at law or suit in equity shall be commenced or maintained hereon, nor recovery had, unless such action or suit is commenced within five years after the cause of action shall accrued."

VII

That Part II of the said application contained the following provisions:
(Just immediately preceding Question No. 14)

"Health. The examiner is expected to use care and interested effort in developing all signs and symptoms, and admissions of previous illness or impaired health."

And at the bottom just preceding the signature of the Insured, the following:

"I hereby declare that all statements and answers as written or printed herein and in Part I of this application are full, complete and true, whether written by my own hand or not, and I agree that they are to be considered the basis of any insurance issued hereon. I hereby authorize any physician or other persons who has, or may attend me [fol. 29] to disclose to said insurance company any information thus acquired."

IX

That in Part I of the application, the insured was asked in what Companies, Societies, or Orders his life was then insured, to which he answered that he had $10,000.00 with the Prudential Life Insurance Company that had been changed from a term policy to life, and that he had also taken out recently a $2,000.00 policy with the Prudential Life Insurance Company that contained a double accident indemnity clause, and that he also had a $2,000.00 policy with the Modern Woodman of America which was taken out in 1900. That Mr. Stewart answered the questions last mentioned substantially as above stated, but plaintiff's soliciting agent, D. N. Parfet inadvertently failed to record the answers as given, writing the answer to said question "M. W. A.—$2,000—1900."

X

That in Part II of said application the insured was asked by plaintiff's medical examiner, Dr. O. C. McCandless, to name all causes for which he had consulted a physician in the last 10 years, to which he answered that he had the flu in February, 1929, and in that illness was bedfast about 2 weeks and confined to the house 5 or 6 weeks, that Dr. McComb, Wichita, Kansas, attended him in that illness and that there was then no remaining effects. Which said answers were written down by Dr. McCandless under the following headings, in the application blank, as follows:

Illness, Influenza. No of Attacks, 1. Date, Feb. 28. Severity and Duration, 2 weeks. Any remaining Effects, No. Attending physician's Name and Address, Dr. McComb, Wichita, Kas.

XI

That plaintiff's said medical examiner after asking the insured the questions required by Part II of the application, all of which pertained to the insured's medical history, then gave Insured a thorough and careful physical medical examination, and made a confidential report thereon to the insurance company stating therein that Mr. Stewart impressed him as a healthy and vigorous man, 63 years old, with no physical defects or deformities. That he weighed him, measured him, took his temperature under the tongue, [fol. 30] his rate of pulse and found it regular, that there

was a slight thickening of the arteries but no sclerosis, took his blood pressure, found his lungs free from every indication of disease, that his heart sounds and rythm were regular and normal and that he found no evidence from percussion or auscultation of hypertrophy or other disease of the heart, that he examined his urine and found a Specific Gravity of 1.026 with acid reaction, clear when voided, no albumen and no sugar, and that he was forwarding a specimen of applicant's urine to the home office for a microscopical examination, and concludes that Mr. Stewart gave the appearance of being in excellent physical condition for his age, and that he regarded him as a first class risk for insurance.

XII

That on February 18, 1932, after the insured had been advised that the medical examiner had recommended the acceptance of his application, he was solicited by plaintiff's agents to take an additional $5,000.00 policy with the plaintiff to be issued upon the same terms as the policy previously applied for, with his son, Reese Smith Stewart, Junior, as the beneficiary; whereupon and on the same date he signed a second form which was identical with Part I of the original application except that his answers were not recorded therein, but in which Reese Smith Stewart, Junior, was named as the beneficiary, it being agreed between the insured and plaintiff's soliciting agents that the questions and answers in the first application should be the basis for the issuance of both policies.

XVII

That on December 27, 1928, Dr. F. J. McComb of Wichita, was called to attend the insured professionally for an illness which he diagnosed as a collapse following an attack of influenza, and he continued in attendance upon Mr. Stewart until February 19, 1929, called on him at his home twice a day up until January 10th and afterwards once a day; that when Dr. McComb first saw the insured on the afternoon of December 27, 1928, he was unconscious, his heart was very weak and the doctor was unable to get any pulse at the wrist for awhile. On this occasion the doctor administered hyperde-mically a digitalis preparation for the heart, to resuscitate him and bring back his circulation. Dr. McComb again saw the insured the evening of December

[fol. 31] 27, 1928, at which time he found him in a semi-conscious condition, in which condition he remained for 2 or 3 days. A few days later the doctor concluded that Mr. Stewart's kidneys were affected and he proceeded to give him medicine to stimulate kidney action and to clear up the toxic condition of his system. Soon after commencing treatment of Mr. Stewart for this illness Dr. McComb discovered that his teeth were in bad condition, and that the gums were badly affected with pyorrhea, and he advised that his teeth be extracted, which was soon done by Dr. Glenn, a local dentist. Thereafter Mr. Stewart responded rapidly and satisfactorily to Dr. McComb's treatment. About the 10th of January, 1929, he was able to leave his bed and sit up for awhile each day, and soon was convalescent, remaining in the house until the 18th of February when he commenced to attend to his business affairs outside, and after the 28th of February, 1929, he commenced to assume normal activities in looking after his property, collecting rents, etc. And during the summer or early fall of 1929 he had recovered from this illness sufficiently to permit of his mowing lawns, engaging in sports such as pitching horseshoes and playing baseball, and worked as a helper with carpenters, plumbers, and other workmen in making repairs on his properties in Wichita. And from that time until about the middle of April, 1932, Mr. Stewart continued to be active, resuming his former activities and doing manual labor and engaging in sports without any apparent impairment resultant from and usually diagnosed as symptoms of heart and/or kidney troubles technically known as myocarditis and nephritis, namely shortness of breath or disturbances in the chest upon occasions of exertion indicating heart trouble, and/or swelling of the ankles or limbs or lassitude or lack of "pep" indicative of kidney trouble.

XIX

That on February 19, 1929, Dr. McComb ceased attending Mr. Stewart and on that date made an entry in his record of the case as follows: "Patient discharged, up and about, and able to go about his business. Still has myocardia insufficiently." Meaning by the latter phrase that the heart was not yet doing the duty it should do. That by the first of March, 1929, Mr. Stewart had sufficiently recovered from his recent illness without a relapse or recur-

rence of symptoms of heart or kidney trouble, and without [fol. 32] requiring any further medical attention, for a period of three years, until about the middle of April, 1932, when Dr. McComb was called and found Mr. Stewart had sustained another attack of the flu with symptoms indicating as before, acute nephritis and acute myocardia, which condition did not respond to treatment as readily as before and which resulted in his death on May 31, 1932, from high blood pressure and a complete stoppage of the kidneys functioning, a condition called in medical parlance, "anuria," and which result was not attributable to or a recurrance of Mr. Stewart's previous illness occur-ing in 1928-1929 before alluded to.

XX

That when Mr. Stewart, in February, 1932, made application for the insurance in question herein he had the appearance of being in excellent physical condition for a man of his age and was rated and accepted as a first-class risk for life insurance by plaintiff's local medical examiner, as well as by local medical examiners for other insurance companies to whom he applied for insurance about that time, and the evidence fails to show that he then knew or was conscious of his being afflicted with any physical ailment that would make him ineligible for life insurance.

Respectfully submitted by William Keith, Attorney for Defendants.

[File endorsement omitted.]

In United States District Court

Findings of Fact and Conclusions of Law—Filed December 7, 1934

The court having considered the evidence introduced by both parties upon the issues presented makes the following

Findings of Fact

I

That these actions were commenced in this court on the 3rd day of September, 1932, for the purpose of cancelling

and setting aside two policies of life insurance issued on the life of Reese Smith Stewart by the plaintiff, in the amount of $5,000.00 each, on the grounds of fraud and misrepresentation alleged to have been made by the insured in the application for said insurance.

[fol. 33] II

That both of said policies were issued by plaintiff on one application, and in one of the policies the insured's wife, Ora Inez Stewart, was designated the beneficiary whereas in the other the insured's son, Reese Smith Stewart, Junior, was so designated.

III

That inasmuch as the same issues of law and fact are involved in both of these actions, they were by order of this court on October 5, 1933, consolidated for the purpose of trial, and the trial of the consolidated action was had before the court beginning on January 3, 1934.

IV

That the plaintiff, The American Life Insurance Company, is now and was at the commencement of said actions a Colorado corporation and a citizen of that state; that the defendant Reese Smith Stewart, Junior, in case No. 713-N is a minor and the son of the insured, Reese Smith Stewart, now deceased, and was then and is now a citizen and resident of Wichita, Sedgwick County, Kansas; that Ora Inez Stewart was at the commencement of said actions, and is now (a) the duly appointed, qualified and acting guardian of said minor, (b) the duly appointed, qualified and acting executrix of the estate of Reese Smith Stewart, deceased, and (c) a citizen and resident of Wichita, Kansas, and was joined as defendant in cause No. 713-N in both said capacities, and in cause No. 714-N as a defendant both individually and as said executrix.

V

That in February, 1932, Reese Smith Stewart at Wichita, Kansas, made application in writing for $5,000.00 of insurance on his life with plaintiff, naming Ora Inez Stewart, his wife, as beneficiary therein. Said written application is in

two parts, designated Part I, consisting of questions and answers asked by and given to plaintiff's soliciting agents, and Part II consisting of questions and answers asked by and given to plaintiff's medical examiner; that Part I was signed by the insured on February 11, 1932, and Part II was signed by the insured on February 18, 1932.

(The defendants object and except, as not supported by and contrary to the evidence, to the finding that the answers [fol. 34] given to Part I of the application were written down as given by the insured to plaintiff's agent, to which an exception is allowed.)

VI

That Part II of said application contained the following provisions immediately preceding the signature of the insured:

"I hereby declare that all statements and answers as written or printed herein, and in Part I of this application are full, complete and true, whether written by my own hand or not, and I agree that they are to be considered the basis of any insurance issued hereon. I hereby authorize any physician or other person who has or may attend me to disclose to said insurance company any information thus acquired."

VII

That in Part I of the application, the insured was asked by plaintiff's soliciting agents with what companies, societies or orders he then had applications for life insurance pending, to which the insured replied that he had made application to New York Life Insurance Company and Metropolitan Life Insurance Company for insurance in the amount of $5,000.00 in each of said companies, and that both of said companies had issued policies to him in said amount and that he had the policies for inspection but had not accepted either. He would apply for a $5,000.00 policy with the plaintiff, on the condition that after it was issued he would compare the three policies and accept whichever one of the three suited him best. He afterwards, however, accepted both said New York Life Insurance and Metropolitan Life Insurance Company policies.

VIII

That in Part I of the application, the insured was asked in what companies, soci-ties or orders his life was then insured, and to name the company, amount, form of policy and year taken out, to which he answered that he only had $2,000.00 in the M. W. *S.* which was taken out in 1900, when as a matter of fact he then had two other policies of life insurance with the Prudential Life Insurance Company, one in the amount of $10,000.00 which was issued in 1921, and one in the amount of $2,000.00 issued January 4, 1932.

(The defendants object and except, as not supported by [fol. 35] and contrary to the evidence, to the finding that the insured had answered that he only had $2,000.00 policy in the M. W. A. to which an exception is allowed.)

IX

That in Part II of said application the insured was asked by plaintiff's medical examiner, Dr. O. C. McCandless, to name all causes for which he had consulted a physician in the last ten years, to which he answered that he had had one attack of influenza. He was then asked the date of the attack and he replied that it was in February, 1928. He was then asked the duration of the attack and he answered, two weeks. He was then asked if there were any complications or remaining effects, and he answered, "no." He was then asked whether he had a physician, and if so, who it was, and he stated that he was attended by Dr. McComb of Wichita, Kansas. Plaintiff's medical examiner wrote down on the application the answers as given by the insured.

(The defendants object and except, as not supported by and contrary to the evidence, the finding that he was asked "if there were any complications or remaining effects," to which an exception is allowed.)

X

That plaintiff's said medical examiner, after asking the insured the questions required by Part I of the application, all of which pertained to the insured's medical history, then gave the insured a physical examination, and relying upon the truthfulness of the insured's answers to the questions

propounded to him regarding his previous illnesses, and from the results of his physical examination, recommended that the insurance be issued.

XI

That on February 18, 1932, after the insured had been advised that the medical examiner had recommended the acceptance of his application, he advised plaintiff's soliciting agents that he wanted an additional $5,000.00 policy with the plaintiff, to be issued upon the same terms as the first, with his son, Reese Smith Stewart, Junior, as the beneficiary; whereupon and on the same date he signed a second form which was identical with Part I of the original application, and in which Reese Smith Stewart, Junior, [fol. 36] was named as the beneficiary, it being agreed between the insured and plaintiff's soliciting agents that the questions and answers in the first application should be the basis for the issuance of both policies.

XII

That the application for both policies, consisting of Parts I and II and the medical examiner's report of the physical examination, as well as the signed form, or Part I, of the second application for an additional $5,000.00 policy, were forwarded to plaintiff's home office in Denver, Colorado, and plaintiff, relying on the truth of the answers therein set forth and the report of the medical examiner, approved the application, and pursuant thereto issued two policies, each in the amount of $5,000.00, in one of which, being No. 33953 Ora Inez Stewart was designated the beneficiary, whereas in the other, being No. 33954, the insured's son, Reese Smith Stewart, Junior, was thus designated. Both policies were dated as of February 23, 1932, and a copy of the application therefor was attached to and made a part of each of said policies.

XIII

That both of said policies so issued by the plaintiff were delivered to the insured on or about February 28, 1932, at which time the insured gave his note to one of plaintiff's soliciting agents, in the amount of $693.00 to cover the first annual premium on each of said policies, whereupon said

soliciting agent forwarded to plaintiff's home office its net portion of the premiums and retained said note.

XIV

That each of said policies so issued by the plaintiff contained the following provision:

"Incontestability: This policy shall be incontestable, except for non-payment of the premiums, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue, except as to provisions and conditions (if any) relating to benefits in event of total and permanent disability and those granting additional insurance against death by accident."

XV

That on to-wit May 31, 1932, the insured died, and there- [fol. 37] after and prior to the commencement of these actions, plaintiff duly advised the defendants and each of them that because of fraud and misrepresentation on behalf of the insured in his application for the insurance, it had elected to cancel and rescind said policies and each of them, and that it did cancel and rescind the same, and at that time plaintiff duly tendered to the defendants the amount of the first annual premiums on said policies, which the defendants and each of them refused to accept.

XVI

That the insured was born on the 4th day of November, 1868, and was past 63 years of age when said policies and each of them were issued.

XVII

That on December 27, 1928, Dr. F. J. McComb, physician and surgeon, was called to attend the insured professionally for an illness, and he continued in attendance until February 19, 1929. The doctor called at the insured's home as often as twice a day up until January 10, and thereafter he called once a day.

XVIII

That when Dr. McComb first saw the insured in the afternoon of December 27, 1928, he was unconscious, his heart

was very weak, and the doctor was unable to get any pulse at the wrist. The patient's limbs were helpless and the tips of his fingers were stenotic, indicating a very weak heart. On this occasion the doctor administered hypodermically a digitalis preparation for the heart, to resuscitate him and bring back his circulation. The patient did not at that time respond to questions asked by the doctor, nor to stimulants and tests given by him.

XIX

That Dr. McComb again saw the insured in the evening of December 27, 1928, at which time he was found in a semi-conscious condition, in which condition he remained for two or three days; that Dr. McComb a few days later found that the insured was suffering from kidney trouble known by the medical term of nephritis, and he was given drugs to stimulate kidney action and to clear up the toxic condition of his system.

[fol. 38]

XX

That when Dr. McComb was first called he was given a history by the insured's family, and a few days later by the insured himself, of an attack of influenza preceding the condition which the doctor found him to be in, by some ten days or two weeks.

(The defendants object and except, as unsupported by and contrary to any evidence, to the finding that insured had an attack of the influenza preceding the condition in which the doctor found him when he called by some ten days or two weeks, to which an exception is allowed.)

XXI

That from the history of influenza given by the family and the insured, and from the doctor's own investigation, he after several days diagnosed the insured's condition as being a collapse following influenza, with complications of the heart and kidneys known by the medical terms as myocarditis and nephritis.

XXII

That Dr. McComb during this illness told the insured as well as members of his family, that his heart and kidneys

were affected and that he would have to ease up on his way of living and take more rest.

XXIII

That when Dr. McComb first saw the insured during his illness he did not expect him to recover, and upon being asked by members of the family if it would be advisable to send for his son living on the West coast, he said that it would.

(The defendants object and except to this finding because it is unwarranted and a mere conclusion, to which an exception is allowed.)

XXIV

That Dr. Glenn, a dentist, was called to the home of the insured on January 17, 1929, to extract his teeth, which were loose and in a very bad condition, and at that time the insured had a bad case of pyorrhea. The insured was in bed and the dentist was advised that he had kidney and heart trouble and it would not be advisable to remove but a few of his teeth at that time. Some of his teeth were [fol. 39] extracted on that occasion and the remainder were taken out later, and it was about April 30 of the same year before the insured was able to have his temporary plates made.

XXV

That when Dr. Glenn would see the insured during the time he was treating him at the home and in the doctor's office, as well as when he would see him on the street occasionally throughout the summer of 1929, the insured appeared weak, short of breath and discouraged because he did not gain his strength faster, and on these occasions he would complain of his heart.

XXVI

That during the month of July, 1929, the insured in referring to his said illness stated that he had been terribly ill and that the medical doctors had given him up entirely, but that his wife, who was a Christian Scientist, and a practitioner who was called in, brought him back to life through their prayers.

XXVII

That on various occasions and as late as the spring of 1931, the insured after slight exertion appeared to be weak and short of breath and complained that his heart was bad.

(The defendants object and except to this finding as unsupported by and contrary to the evidence, as to which an exception is allowed.)

XXVIII

That Dr. McComb was again called to attend Stewart at his home on April 13, 1932. At that time the doctor again found him prostrated and unable to answer questions intelligently. This illness was complicated by heart and kidney trouble, and on May 28 of said year there was complete stoppage of the kidneys, the pulse ran up to 160 and the blood pressure was 190, and on the following May 31 the patient died after an uremic convulsion.

XXIX

That the human heart is one of the most vital organs in the body, and its function is more important than any other organ so far as health and life are concerned, because various other organs of the body depend upon the heart's integrity and proper functioning in order to perform their duties.

[fol. 40]

XXX

That there is a close relationship between the heart and the kidneys, and that a weak heart may cause weak kidneys and vice versa.

XXXI

That the illness which the insured suffered in 1928 and 1929 impaired his heart and kidneys and caused some permanent damage that weakened him substantially.

(The defendants object and except to this finding because it is unsupported by and contrary to the evidence, to which an exception is allowed.)

XXXII

That an individual having an illness such as the insured suffered from in 1928 and 1929 would be in danger of a

flareup of the heart and kidneys on any slight il-ness which he might thereafter have.

(The defendants object and except to this finding because it is unsupported by and contrary to the evidence, to which an exception is allowed.)

XXXIII

That in case of heart and kidney trouble such as the insured had during his first illness, there are periods of remission or times when pathological findings are not as noticeable or pronounced as at other times, the degree and severity of such disorders depending somewhat upon the diet and general condition of the patient.

(The defendants object and except to the said finding as a scientific conclusion not founded upon any facts in this case, to which an exception is allowed.)

XXXIV

That a true history of previous diseases and complications is of the utmost importance to a medical examiner in arriving at a conclusion regarding the condition of certain organs of the body, and this is particularly true of the heart and kidneys. There are certain diseases or impairments of the heart which cannot be detected by the medical examiner in the course of the ordinary life insurance examination. Likewise, a man may have a badly damaged kidney and at [fol. 41] times there would be nothing in the urine to indicate it. However, where there is a history of heart or kidney impairment it can be followed up and further tests and investigation made in order to arrive at an opinion as to whether or not the individual is a good life insurance risk.

(The defendants object and except to this finding as not a conclusion of the facts of this case, but as a conclusion relating to mere probability and not founded upon any facts in this case, to which an exception is allowed.)

XXXV

That notice to an examining physician for life insurance of an attack by the applicant of influenza of two weeks duration, unaccompanied by any complications or remaining ef-

fects, would not arouse the examiner's suspicions or warrant further investigation.

(The defendants object and except to this that it is not a finding of fact supported by any evidence in this case, but a mere theoretical probability, to which an exception is allowed.)

XXXVI

That if the insured had told Dr. McCandless, the plaintiff's examining physician, of his heart and kidney trouble, and had given him the true facts concerning his illness in 1928 and 1929, such information would have been written upon the application and further tests would have been made and the examining physician would have stated in his report to the plaintiff that a further examination would be necessary and he would not have rated the insured as a first class risk, as was done on his report.

(The defendants object and except to this finding that the statements that the insured had not given the true facts concerning his illness is unsupported by and contrary to the weight of the evidence, and the defendants object and except to the finding that such information would have resulted in further tests as unsupported by and contrary to the weight of the evidence, and a mere theoretical conclusion of probabilities and not a finding of fact, to which exceptions are allowed.)

XXXVII

That plaintiff's medical director, whose duty it was to [fol. 42] pass upon Stewart's application for insurance, after studying the application and relying upon the matters set out therein as being true, approved the same; that if Stewart's application for insurance had shown the true facts concerning his illness in 1928 and 1929, or if plaintiff's medical examiner had known of those facts, said application would have been rejected.

(The defendants object and except to the conclusion in this finding as unsupported by and contrary to the weight of the evidence, and relates to probabilities instead of facts, as to which an exception is allowed.)

XXXVIII

That the insured obtained $32,000.00 of life insurance in addition to the insurance obtained from the plaintiff, from four other insurance companies, between January 1 and April 15, 1932, and he made application to one of said companies for a duplicate policy but said company advised that it felt that at his age he had sufficient insurance.

(The defendants object and except to the facts found for the reason that they are immaterial to the issues in this case, to which an exception is allowed.)

XXXIX

That the fair and reasonable value of the estate left by the insured at the time of his death was $10,595.41, consisting of real estate of the value of $9,285.41 and personal property of the value of $1,310.00.

XL

That the insured in making application for said insurance knowingly and willfully misrepresented to and concealed from the plaintiff the true facts concerning his illness in 1928 and 1929; that such misrepresentations and concealment were material to the risk and were made by the insured to induce the plaintiff to issue said insurance; that said misrepresentations and concealment were relied upon by plaintiff and it was thereby deceived and said insurance would not have been issued if insured had given "full, complete and true" facts concerning said illness in his application for said insurance.

(The defendants object and except to the finding that the insured knowingly and willfully misrepresented and [fol. 43] concealed facts from the plaintiff concerning his illness, for the reason that such finding is unsupported by and contrary to the weight of the evidence; and defendants object and except to the finding that the plaintiffs would not have issued insurance except upon the alleged representations, because it is a mere conclusion and unsupported by the weight of and contrary to the evidence, as to which exceptions are allowed.)

XLI

That the plaintiff at the beginning of the trial of these cases on January 3, 1934, with the permission of the court,

paid to the clerk of this court $773.15, representing the amount of the first yearly premiums on both of said policies, with interest at 6% per annum, for the benefit of the defendants.

CONCLUSIONS OF LAW

The court finds as a matter of law:

I

That said policies of insurance issued to Reese Smith Stewart by plaintiff herein, being numbered 33953 and 33954 respectively are void and of no force and effect, because of the fraud, misrepresentation and concealment of the insured in obtaining said insurance.

(The defendants object and except to the conclusion of the law on the facts found in this case, to which an exception is allowed.)

II

That said policies and each of them should be cancelled and set aside, and plaintiff's liability limited to the return of the amount of the first annual premiums on said policies with interest on said sum at the rate of 6% per annum from February 28, 1932, until the commencement of this trial on January 3, 1934, which amounts to $773.15.

(The defendants object and except to the conclusion of the law on the facts found in this case, to which an exception is allowed.)

Richard J. Hopkins, Judge.

[File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT

DECREE—Filed December 7, 1934

Now on this 22nd day of November, 1934, the above cases (consolidated) came on to be further heard at this term, and were argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, Adjudged and Decreed as follows, viz:

1. In pursuance of Equity Rule 70½ the court has made and simultaneously herewith is separately filing its findings of fact and conclusions of law and they shall be entered of record as a part of this decree.

2. That the two life insurance policies issued by plaintiffs upon the life of Reese Smith Stewart herein involved, the same being numbered 33953 and 33954 respectively and dated February 23, 1932, and each of them are cancelled, set aside and held for naught.

3. That the defendants shall deliver to the clerk of this court said policies for cancellation and surrender to plaintiffs within ten days from the entry of this decree at which time said clerk shall pay over to the defendant Ora Inez Stewart, as the executrix of the estate of Reese Smith Stewart, deceased, the sum of Seven Hundred Seventy-three Dollars and Fifteen Cents ($773.15), representing the first annual premiums on said policies collected by plaintiffs and by them deposited with said clerk at the beginning of the trial of these cases (consolidated).

4. That plaintiffs have and recover their costs taxed by the clerk in the amount of $125.32.

To all of which rulings of the court the defendants duly excepted.

The defendants, and each of them, further except to the court's refusal and failure to make findings as requested by the defendants and/or findings upon the subject matter covered by said requested findings, the said findings being numbered 6, 7, 9, 10, 11, 12, 17, 19 and 20, and except as to each of them, as to which, and each of them, the defendants are allowed an exception.

The defendants, and each of them, further except to the failure and refusal of the court to make each of the conclusions of law requested, being numbered 1, 2, 3, 4 and 5. [fol. 45] The said findings and the said conclusions of law being as they appear in defendants' requested findings of fact and conclusions of law filed in the above-entitled cases.

The defendants having signified their intention to take an appeal in these cases, and upon their application

It Is Ordered that the decree herein rendered is stayed Ninety for a period of [sixty]* days, [and further stayed upon their filing their petition for an appeal and during and pending such appeal]*.

Richard J. Hopkins, Judge.

Okeh: Vermilion, Evans, Carey & Lilleston, Attorneys for Plaintiffs. William Keith, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ON RESERVED RULINGS AS TO ADMISSIBILITY OF EVIDENCE—Filed December 8, 1934

Now on this 22nd day of November, 1934, the above cases (consolidated) came on for further hearing and ruling of the court on the following questions of evidence, to-wit:

1. On the trial of these cases (consolidated), plaintiffs, after submitting their evidence in chief, objected to the introduction of any evidence by the defendants under their answers as amended, on the grounds that said answers tendered no issue, to which objection, the court reserved its ruling and heard the defendants' evidence.

2. On the trial, the defendants offered the testimony of a number of witnesses for the purpose of showing the good character and reputation of the insured, Reese Smith Stewart, for honesty and fair dealing, to all of which testimony plaintiffs seasonably objected on the grounds that the reputation of the insured was not in issue and that such testimony was incompetent, irrelevant and immaterial in such actions. The court allowed the evidence to be introduced, reserving its ruling on said objections.

It is now by the Court Ordered:

That the plaintiffs' objection set forth in Paragraph 1 above should be and it is overruled.

[* Matter in brackets, struck out in copy.]

[fol. 46] It is further Ordered that plaintiffs' objections to the testimony referred to in Paragraph 2 of the above should be and they are sustained.

To all of the rulings of the court on the objections to the evidence referred to in Paragraph 2 above, the defendants duly excepted.

Richard J. Hopkins, Judge.

Approved: Vermilion, Evans, Carey & Lilleston, Attorneys for Plaintiffs. —— ——, Attorney for Defendants.

[File endorsement omitted.]

In United States District Court

Petition for Appeal—Filed February 12, 1935

In Equity. No. 713-N

George T. McDermott, Circuit

To the [Honorable Richard J. Hopkins, District]* Judge:

The above-named defendants feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 7th day of December, 1934, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit under the rules of such court in such cases made and provided.

Your Petitioners further pray that the proper order relating to the required security to be required of them be made.

Your Petitioners represent that Reese Smith Stewart, Junior, was a minor when this action was commenced and has reached the age of majority and now prosecutes this action in his own behalf.

William Keith, Yankey, Osborne & Sears, Attorneys for Defendants.

[* Matter in brackets, struck out in copy.]

Appeal allowed this 12th day of February, 1935, upon [fol. 47] giving cost bond as required by law for the sum of Five Hundred Dollars ($500.00), to be approved by the clerk.

It is Further Ordered that the said appeal may be prosecuted by Reese Smith Stewart, Junior, in his own behalf.

Geo. T. McDermott, Judge.

[File endorsement omitted.]

In United States District Court

Petition for Appeal—Filed February 14, 1935

In Equity. No. 714-N

Geo. T. McDermott, Circuit

To the [Honorable Richard J. Hopkins, District]* Judge:

The above-named Ora Inez Stewart feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 7th day of December, 1934, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Tenth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and she prays that her appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit under the rules of such court in such cases made and provided.

Your Petitioner further prays that the proper order relating to the required security to be required of her be made.

William Keith, Yankey, Osborne & Sears, Attorneys for said Defendant.

Appeal allowed this 12th day of February, 1935, upon giving cost bond as required by law for the sum of Five Hundred Dollars ($500.00), to be approved by clerk.

Geo. T. McDermott, Judge.

[File endorsement omitted.]

[*Matter in brackets, struck out in copy.]

[fol. 48] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed February 11, 1935

In Equity. No. 713-N

Come now the defendants in the above-entitled cause and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the order and decree made by this Honorable Court on the 7th day of December, 1934, and state that the United States District Court for the District of Kansas, Second Division, erred in the following matters:

1. In cancelling and setting aside the life insurance policy upon the life of Reese Smith Stewart, and in which the defendant Reese Smith Stewart, Junior, was the beneficiary, in that the said order and decree was contrary to the law and rules of equity.

2. In overruling the defendants' motion to dismiss the bill trial of this case were insufficient in equity to entitled the plaintiff to the relief granted it.

4. That under the evidence the defendants were entitled to a decree sustaining the said policy as a valid and existing contract.

5. That the conclusion of law that the policy on the life of Reese Smith Stewart was void because of the fraud, misrepresentation and concealment of the assured in obtaining said insurance was contrary to equity and contrary to law.

6. In that part of its Finding of Fact No. 5 wherein it found that in the application designated Part One the answers there given were written down by plaintiffs' agent as given by the insured.

7. In its Finding of Fact No. 8.

8. In its Finding of Fact No. 31.

9. In its Finding of Fact No. 36.

10. In its Finding of Fact No. 37.

11. In its Finding of Fact No. 40.

12. In its failure and refusal to make the Requested Finding of the defendant numbered 11, or to make a finding on the subject matter to which the requested finding related.

[fol. 49] 13. In its failure and refusal to make the Requested Finding of the defendant numbered 17, or to make a finding on the subject matter to which the requested finding related.

14. In the admission of the testimony of Dr. E. S. Edgerton as follows:

"Q. If a man 61 years of age had made application to you for life insurance, ordinary life insurance, and had given you a history of an ailment and disease such as Dr. McComb here described as Mr. Stewart having been afflicted with in 1928-1929 what action would you take upon such application?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial and not within the realm of expert testimony.

"By the Court: Overruled.

"A. I would not recommend him for insurance.

"By Mr. Keith: Object and move that the answer be stricken out as being incompetent, irrelevant and immaterial.

"By the Court: Overruled.

"By Mr. Keith: An exception please."

15. In admitting the testimony of Dr. Cochems as follows:

"Q. Assuming that Exhibit D had disclosed on the front part of it, and on its face, that the applicant had an attack of flu in December, 1928, beginning December 12, 1928, and from that he had myocardiac and nephritis, and was down and under treatment of a medical doctor for a period of some seven weeks. I will ask you to state that assuming that the application had stated those facts and if you had known those facts, what action would you have taken on the application?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. We probably would not have accepted it until we had made a further investigation and examination, and got further evidence."

16. In admitting the testimony of Dr. Cochems as follows:

"Q. If you had made further examination, and had discover- that this applicant had the disability or disease that [fol. 50] Dr. McComb testified to, then what would have been your action on these applications?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and giving his personal opinion at this time on a past event.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. We would have rejected it."

17. In admitting the testimony of Dr. O. C. McCandless as follows:

"Q. Assuming that the answer to Question 14, that the applicant Mr. Stewart had told you that he had heart or kidney trouble in 1928 or 1929 and that he had been down and under the care of Dr. McComb for a period of something like seven weeks, and had been treated for heart or kidney trouble, would that have influenced your action in any way?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. I would have made,—yes, it would have made a difference.

"Q. What difference would it have made?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. Well, in case of a history of heart disease, or kidney disease, I would have taken one or two alternatives. Since they were negative findings, for the benefit of the appli-

cant, we would have either gone into a further test, or further examination, or if the facts warranted, would have disqualified the man from *from* taking insurance.

"By Mr. Keith: Move to strike out the answers as being incompetent, irrelevant and immaterial, stating a conclusion of the witness on past events.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"Q. Would you have put that information on the application blank?

[fol. 51] "By Mr. Keith: Object as being incompetent, irrelevant and immaterial, a statement of past events calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. Yes.

"Q. What effect would that information have had upon your recommendation for life insurance?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. Of course, I would not have rated him first-class.

"Q. What would you have done?

"By Mr. Keith: The same objection.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. I would have either put in remarks my opinion that further examination would be necessary, and I would have put down the degree of risk that I thought he should have had."

18. In excluding the testimony of the defendants' witnesses R. C. Clevenger, Frank S. Frisbie, Floyd DeNore, Elmer C. Moore, John Daniels, J. J. Parkinson and Paul Watson who had testified that they had known the insured for many years, and knew of his reputation in the community where he lived for uprightness, honesty and fair dealing, and when asked as to that reputation whether it was

good or bad, upon objections made by the plaintiff, their answers were excluded.

Wherefore, the defendants pray that the said order and decree be reversed and set aside, and the said District Court be ordered to enter an order and decree dissolving and setting aside the said order and decree appealed from, and that it be further ordered to enter an order and decree that the said insurance policy is a valid and existing contract binding upon the plaintiff.

William Keith, Yankey, Osborne & Sears, Attorneys for the Defendants.

[File endorsement omitted.]

[fol. 52] In United States District Court

Assignment of Errors—Filed February 11, 1935

In Equity. No. 714-N

Come now the defendants in the above-entitled cause and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the order and decree made by this Honorable Court on the 7th day of December, 1934, and state that the United States District Court for the District of Kansas, Second Division, erred in the following matters:

1. In cancelling and setting aside the life insurance policy upon the life of Reese Smith Stewart, and in which the defendant Ora Inez Stewart was the beneficiary, in that the said order and decree was contrary to the law and rules of equity.

2. In overruling the defendants' motion to dismiss the bill and supplemental bill for want of equity.

3. That the evidence and facts thereby established in the trial of this case were insufficient in equity to entitled the plaintiff to the relief granted it.

4. That under the evidence the defendants were entitled to a decree sustaining the said policy as a valid and existing contract.

5. That the conclusion of law that the policy on the life of Reese Smith Stewart was void because of the fraud, misrepresentation and concealment of the assured in obtaining said insurance was contrary to equity and contrary to law.

6. In that part of its Finding of Fact No. 5 wherein it found that in the application designated Part One the answers there given were written down by plaintiffs' agent as given by the insured.

7. In its Finding of Fact No. 8.

8. In its Finding of Fact No. 31.

9. In its Finding of Fact No. 36.

10. In its Finding of Fact No. 37.

11. In its Finding of Fact No. 40.

12. In its failure and refusal to make the Requested Finding of the defendant numbered 11, or to make a finding [fol. 53] on the subject matter to which the requested finding related.

13. In its failure and refusal to make the Requested Finding of the defendants numbered 17, or to make a finding on the subject matter to which the requested finding related.

14. In the admission of the testimony of Dr. E. S. Edgerton as follows:

"Q. If a man 61 years of age had made application to you for life insurance, ordinary life insurance, and had given you a history of an ailment and disease such as Dr. McComb here described as Mr. Stewart having been afflicted with in 1928-1929 what action would you take upon such application?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial and not within the realm of expert testimony.

"By the Court: Overruled.

"A. I would not recommend him for insurance.

"By Mr. Keith: Object and move that the answer be stricken out as being incompetent, irrelevant and immaterial.

"By the Court: Overruled.

"By Mr. Keith: An exception please."

15. In admitting the testimony of Dr. Cochems as follows:

"Q. Assuming that Exhibit D had disclosed on the front part of it, and on its face, that the applicant had an attack of flu in December, 1928, beginning December 12, 1928, and from that he had myocardiac and nephritis, and was down and under treatment of a medical doctor for a period of some seven weeks. I will ask you to state that assuming that the application had stated those facts and if you had known those facts, what action would you have taken on the application.

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. We probably would not have accepted it until we had made a further investigation and examination, and got further evidence."

16. In admitting the testimony of Dr. Cochems as follows:

[fol. 54] "Q. If you had made further examination, and had discover- that this applicant had the disability or disease that Dr. McComb testified to, then what would have been your action on these applications?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and giving his personal opinion at this time on a past event.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. We would have rejected it."

17. In admitting the testimony of Dr. O. C. McCandless as follows:

"Q. Assuming that the answer to Question 14, that the applicant Mr. Stewart had told you that he had heart or kidney trouble in 1928 or 1929 and that he had been down and under the care of Dr. McComb for a period of something like seven weeks, and had been treated for heart or kidney trouble, would that have influenced your action in any way?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. I would have made,—yes, it would have made a difference.

"Q. What difference would it have made?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. Well, in case of a history of heart disease, or kidney disease, I would have taken one or two alternatives. Since they were negative findings, for the benefit of the applicant, we would have either gone into a further test, or further examination, or if the facts warranted, would have disqualified the man from *from* taking insurance.

"By Mr. Keith: Move to strike out the answer as being incompetent, irrelevant and immaterial, stating a conclusion of the witness on past events.

"By the Court: Overruled.

"By Mr. Keith: An exception.

[fol. 55] "Q. Would you have put that information on the application blank?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial, a statement of past events calling for a conclusion of the witness.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. Yes.

"Q. What effect would that information have had upon your recommendation for life insurance?

"By Mr. Keith: Object as being incompetent, irrelevant and immaterial.

"By the Court: Overruled.

"By Mr. Keith: An exception.

"A. Of course, I would not have rated him first-class.

"Q. What would you have done?

"By Mr. Keith: The same objection.
"By the Court: Overruled.
"By Mr. Keith: An exception.

"A. I would have either put in remarks my opinion that further examination would be necessary, and I would have put down the degree of risk that I thought he should have had."

18. In excluding the testimony of the defendants' witnesses R. C. Clevenger, Frank S. Frisbie, Floyd DeNore, Elmer C. Moore, John Daniels, J. J. Parkinson and Paul Watson who had testified that they had known the insured for many years, and knew of his reputation in the community where he lived for uprightness, honesty and fair dealing, and when asked as to that reputation whether it was good or bad, upon objections made by the plaintiff, their answers were excluded.

Wherefore, the defendants pray that the said order and decree be reversed and set aside, and the said District Court be ordered to enter an order and decree dissolving and setting aside the said order and decree appealed from, and that it be further ordered to enter an order and decree [fol. 56] that the said insurance policy is a valid and existing contract binding upon the plaintiff.

William Keith, Yankey, Osborne & Sears, Attorneys for the Defendants.

[File endorsement omitted.]

[Cost bonds in the sums of $500 each, approved by the clerk of the District Court, with appellants as principals, were filed in the District Court on Feb. 16, 1935.]

IN UNITED STATES DISTRICT COURT

Statement of Evidence under Equity Rule 75 (b)—Filed March 4, 1935

Be It Remembered that the above-entitled causes, consolidated, came on regularly for trial before the Honor-

able Richard J. Hopkins, judge of said court sitting in equity on the third day of January, 1934, upon the issues formed by the bills of complaint and the amendments thereto and the amended answers thereto, Joseph G. Carey and Henry V. Gott appearing as counsel for the complainant and William Keith appearing as counsel for the defendants.

Plaintiff's Evidence

D. M. PARFET was first called as a witness on behalf of the complainant and testified as follows:

I am a tire salesman, 51 years old, and now live in Los Angeles, California; came to Wichita, Kansas, in December, 1931, as supervisor of agents for complainant, The American Life Insurance Company, in which capacity I sold life insurance, hired agents and supervised soliciting agents for the company there. Roy Otto was then working for the company there as a soliciting agent under me. I first met the insured, Reese Smith Stewart, about February 1, 1932, at his home in Wichita where Roy Otto had taken me to solicit insurance on his (Reese Smith Stewart's) life. Stewart had invited us out. I was then introduced to Mr. Stewart as the supervisor of agents of The American Life Insurance Company and we talked life insurance for thirty-five or forty minutes, and were asked to come back again. In introducing me to Mr. Stewart Roy Otto said that he [fol. 57] (Stewart) had made an application for a Five Thousand Dollar policy in the New York Life Insurance Company and for a Five Thousand Dollar policy in the Metropolitan Life Insurance Company; that the policies had not come back yet and he (Stewart) did not know until he had looked them over what he was going to do, but that he had known Otto for a long time and that if there was any chance to give him the business he was going to do it. Roy Otto and I again saw the insured (Stewart) at his home on February 11, 1932, and defendant Ora Inez Stewart was there a part of the time. When we first went in we talked rates and policies and finally Mr. Stewart said he would make an application and inspect the policy and would take it if it suited him better than the policies he had applied for with the New York Life and the Metropolitan Life Insurance Company. (Witness identifies application blank marked Exhibit A.) I asked him the ques-

tions set forth on the face of said exhibit and he gave me the answers to them. I produced the application blank marked Exhibit A and had some conversation regarding it and the insurance he was to apply for and in answer to the questions thereon he said his full name was Reese Smith Stewart; born at Kirksville, Missouri, November 4, 1868; that he had lived at his present address in Wichita thirteen years and had retired from business, except looking after interests eight years ago. He said that no company, society, order or agent ever declined or postponed his application for life insurance differing in form, amount or premium rate from that for which he had applied. He said that he had an application for life insurance pending, Five Thousand Dollars New York Life and Five Thousand Dollars Metropolitan, for inspection; that if he could he wanted to buy it from Roy and that he was going to compare them and take the policy that suited him best. I asked him if his life was now insured and he said in the M. W. A. in the amount of Two Thousand Dollars taken out in 1900. I wrote down the answers as he gave them to me. After completing the questions and answers I handed the application across the table for his signature and then to Mr. Otto for his signature. (Signatures identified.) I then took the application to the office and made notation in Part I "C letter attached." The reverse side of Exhibit A is the agent's report signed by Roy Otto. I forwarded the application to the company at Denver accompanied by Exhibit B which is a letter explaining the situation with respect to the two Five Thousand Dollar policies pend-
[fol. 58] with the New York Life and Metropolitan companies. On February 18, after Stewart had been examined, he and Otto came to my office and Otto said that Stewart would like to have another Five Thousand Dollar policy with his son made beneficiary if we could take care of him on the same basis as the first one, so we had him sign another application (Exhibit C) for Five Thousand Dollars with his son, Reese Smith Stewart, Junior, made beneficiary. This application was blank except the name of insured, amount of insurance and name of beneficiary; that is to say, we did not write all his answers in to the questions, but simply referred to the previous application. This application was mailed to the home office of the company in Denver.

Plaintiff introduced in evidence the exhibits hereinbefore referred to by the witness D. M. Parfet, which were received in evidence and marked Plaintiff's Exhibit A, B and C, respectively, Exhibit A being in words and figures following, to-wit:

EXHIBIT "A"

Part One of Application for Insurance

The American Life Insurance Company, Denver, Colorado

1. Full Name, Given, Reese, Middle, Smith, Family, Stewart.

2a. Place of Birth, Town, Kirksville, County, State, Mo.

2b. Date of Birth, Day, 4, Month, November, Year, 1868.

3. Present Residence Address, No. 2920 East First Street, Town, Wichita, County, Sedgwick, State, Kansas. Country Location — miles in a — direction from the town of —— on R. F. D. No. —. Lived at the above address 13 years.

4. Previous addresses past two years Same.

5a. Present occupation? Retired.

b. Name of employer? Self.

c. Business address? Same.

d. Do you wish premium notices sent to your residence or business address? Residence.

e. Length of time employed in present occupation? Retired 8 yrs. ago.

f. Other occupations, if any? Looking after interest.

g. Previous occupations during past five years? Same as above.

[fol. 59] 6a. What Company, Society, Order or Agent ever declined or postponed your application for Life Insurance or offered you Life Insurance differing in form, amount or premium rate from that for which you applied? None.

b. With what Companies, Societies or Orders have you an application for Life Insurance now pending? 5000 N. Y. Life, 5000 Metropolitan, (For inspection). C. Letter Attached.

7a. Amount of Insurance applied for? $5000.

b. Kind of policy applied for? No.

c. Premium waiver benefit? No.

d. Monthly income disability benefit? No.
e. Double indemnity benefit? No.
f. Life conservation benefit? No.
g. Annual premium? $34650.

8. Do you desire premium loan privilege to be automatic? Yes.

9. Is this application to replace insurance in this or any other company? No.

10. In what companies, societies or orders is your life now insured? Company, M. W. A., Amount, 2000, Form of Policy, Year Taken, 1900, and no others.

11. Beneficiary with — right to change, Name, Ora Inez Stewart, Age 57, Relationship, Wife.

12. Remarks: (Use this space for ordering additional policies, special instructions as to date of policy, short term, method of payment of renewal premiums, etc.)

Issue an additional $5000 policy on same plan with Reese Smith Stewart Jr. Son as

13. This space for Home Office Additions or Corrections. according to agreement below. Beneficiary. Plan of Insurance: Ordinary Life.

It Is Agreed (1) that there shall be no liability hereunder until a policy shall be issued, and delivered to me, while in good health, and the first premium thereon actually paid during my lifetime; provided, however, that if said premium is paid in full in cash to the said Company's Agent at the time of making this application, and if said Company shall be satisfied as to my insurability on the plan applied for herein, on the date hereof, then the insurance (subject [fol. 60] to the provisions of the policy applied for) shall be effective from the date of said application; (2) that my acceptance of any policy issued on this application, whether or not upon the form applied for herein, will constitute a ratification by me of any change in the form of the Policy, or correction in or addition to the application, made by the Company in the space above headed "Home Office Corrections or Additions," a copy of which constitutes sufficient notice to me of the change made.

I have paid to the Agent $— intended to be the first annual premium on the policy applied for, the sum to be applied in accordance with the provisions of the above agreement, and of the Binding Receipt bearing the same

number as this application, which has been delivered to and accepted by me subject to the conditions thereof.

I hereby agree to submit to such examinations by the Company's Medical Examiners and to furnish such further information as may be required by the Company.

Signed at Wichita, State of Kansas, this 11 day of February, 1932.

Witnessed by Roy H. Otto, Agent.

Signature of Applicant in Full and of Guardian if Required: Reese Smith Stewart.

No. 67486. Form 183—25M—5-31. Bradley-Parfet Agency.

(On reverse side)

It Is Agreed (1) that there shall be no liability hereunder until a policy shall be issued and delivered to me, while in good health, and the first premium thereon actually paid during my lifetime; provided, however, that if said premium is paid in full in cash to the said Company's Agent at the time of making this Application, and if said Company shall be satisfied as to my insurability on the plan applied for herein, on the date hereof, then the insurance (subject to the provisions of the policy applied for) shall be effective from the date of said medical examination.

If no policy is issued on the application to which this receipt was attached, the settlement acknowledged hereby will be returned.

[fol. 61] If you do not hear from this Application within thirty days, write direct to "The American Life Insurance Company of Denver, Colorado," giving full details.

Non-medical cases will not be acted on and medical cases will be held for inspection reports unless the Agent's Report is completed. Questions 1 to 14, inclusive, must be answered in every case. If you do not wish to assume any responsibility for the character of the risk or do not have personal knowledge sufficient to answer questions 15 to 21, please so indicate as check marks are not acceptable as answers.

Agent's Report

1. The total cash collected hereon is $..... Settlement. The total of the notes taken hereon is $..... on Dlvry. The total settlement received hereon is $..... of Policy.

2. Have you accepted or agreed to accept anything in lieu of cash or the notes taken on the application?

3. The notes taken for settlement are due as follows:

$.....	due..... 19..	$.....	due..... 19..
$.....	due..... 19..	$.....	due..... 19..

4. What arrangement have you made for selling any of the above notes? Settlement on del of Policy.

5. If the applicant did not settle with you when the application was taken, what advance agreement have you for doing so when the policy is delivered?

6. To whom should the policy be mailed? Bradley-Parfet.

7. The names and proportion of interest of all agents in this application are as follows. No one agent has any interest except as herein stated. Roy H. Otto.

8. Was this application procured by you through an agent of this or any other company? (If so, give the name of such agent, the company he represents and the commission such agent is to receive.) Roy H. Otto.

9. Give below names and addresses of three persons, not relatives, to whom the company may refer. 4th Natl. Bank, Wichita; 1st Natl. Bank, Wichita; M. Goodard, Atty., Wichita.

10. How long have you known the applicant? 15 years.

11. How closely have you been associated with him in a fraternal, social or business way? None.

[fol. 62] 12. Does the applicant appear older than the age at which the policy is applied for? No.

13. Does the appearance of the applicant indicate good health? Yes.

14. Are the answers to the following questions given from your own personal knowledge? Yes.

15. Does the applicant have a good moral and financial reputation? Yes.

16. Do you have knowledge of any illness, injury, operation or affliction of any kind not acknowledged by the applicant in Part 2? No.

17. (a) Does the applicant ever drink to excess so as to need assistance, or otherwise show that he has be-n drinking in excess? No.

(b) How often does he drink to this extent? None.

(c) Has the applicant ever drank to excess in the past? No.

(d) Do you know of or have you ever heard of any report of the applicant taking any cure for the liquor or drug habit? No.

18. Do you feel beyond any question of a doubt that the applicant has no connection whatever with the manufacture or sale of any kind of alcoholic liquor or beverage? Yes.

19. Do you unqualifiedly recommend the applicant for standard insurance without a medical examination? Yes.

20. If the answers to questions 15 to 18 were obtained from information given by some other person give the name and address of such person. 15 yrs. acquaintance.

21. Give a full statement covering applicant's business connections and working surroundings as well as his social standing and home life. Amplify any incomplete or unfavorable answers given above; also give any additional information that you feel may have a bearing on the acceptance or rejection of the applicant. The extent to which you are willing to go on record in regard to this applicant may mean the difference between an approval and a rejection. Retired from Real Estate business. 1st class.

I hereby certify that I personally solicited and secured this application; that I have read each question on Part I and II to the applicant and recorded his answers exactly as given; that my Confidential report has been made to the [fol. 63] best of my knowledge and belief; and that I know nothing detrimental to the risk that is not recorded in these papers.

I hereby agree, if the Company issues a policy on this application without waiting for the inspection report, and should subsequently find the risk undesirable, that I will return the applicant the settlement given me within five days, take up the policy issued and return it to the Company for cancellation.

Date February 11th, 1932.

Roy H. Otto, Agent.

Exhibit C introduced in evidence as aforesaid is identical with the printed form of questions, instructions, etc., as shown by Exhibit A, except the following:

7a. Amount of insurance applied for? $5000.

g. Annual Premium? $346.50.

11. Beneficiary with — right reserve to change. Name, Reese Smith Stewart Jr. Age, 18. Relationship, Son.

Signed at Wichita, State of Kansas, this 18 day of February, 1932.

Witnessed by Roy H. Otto, Agent.

Signature of Applicant in Full and of Guardian if Required: Reese Smith Stewart.

No. 67478. Form 183—25M—5-31. Bradley-Parfet Agency.

Cross-examination:

Mrs. Stewart admitted us at the home February 11th. We were seated in the living room and remained there about thirty minutes engaged in conversation on the subject of insurance; (we then went into the dining room and Mrs. Stewart went into the kitchen.) We were trying to sell an insurance policy to Mr. Stewart. Mr. Stewart was sitting in a Morris chair in front of the fire place, but I do not recall drawing my chair up to write the application on the arm of his Morris chair. I am testifying from my recollection now. As I recall we stayed in the dining room taking the application about thirty minutes, talked about the insurance all the time. In taking the second application February 18th we just adopted the questions and answers in the first application as applying to both policies.

[fol. 64] E. M. GLENN was then called as a witness for the plaintiff and testified as follows:

I am a dentist, residing at 339 South Erie, Wichita, practiced in Wichita for ten years and have been practicing dentistry since 1904, was called by Dr. McComb to go out to Mr. Stewart's home and extract his teeth on January 17, 1929. Found his gums and teeth in very bad condition from pyorrhea. Mr. Stewart was in bed and very weak. Dr. McComb advised me that he had heart and kidney trouble and that I could only take out a few of his teeth at a time. I extracted his teeth a few at a time but was not able to put in temporary plates until about the 30th of April, 1929. Saw Mr. Stewart after April 30, 1929, occasionally

through that summer and on those occasions he appeared not — be very strong and slightly exhausted and would be short of breath. He apparently was discouraged that he didn't gain his strength back any faster and would speak of his heart but said nothing in particular about it and didn't say why he was short of breath. I gave him an anesthetic, novacaine, when I extracted his teeth.

Cross-examination:

I extracted Mr. Stewart's teeth while he was sick in bed with the flu when Dr. McComb was attending him. I completed my dental work for Mr. Stewart about three months after he had the flu. He complained to me after he had the flu when he came to my office or on the street wherever I would see him. I treated his gums and made him a set of false teeth. I did not treat him for the condition resulting from pyorrhea and don't know anything about his heart, except what he said to me while I was attending to his teeth and met him on the street occasionally that summer.

Dr. T. J. McComb was then called as a witness on behalf of the plaintiff and testified as follows:

I am a physician and surgeon in general practice in Wichita, Kansas. Practiced medicine 25 years, 23 of which in Wichita. First saw the insured, Reese Smith Stewart, December 27, 1928, when called to his home on account of an illness. Probably three or four o'clock in the afternoon. He was unconscious and didn't respond to any questions or stimulants or tests gave him at that time. Then under my [fol. 65] observation one-half or three-quarters of an hour, I gave him a digitalis preparation for the heart and tried to resuscitate him and bring back circulation, which was very poor at that time. I felt of his limbs which were helpless but could not tell whether it was exhaustion or paralysis. Saw him again that evening when I got some response to questions and to reflex and he seemed to be much improved. He was then in a semi-conscious condition; his pulse was very weak; in fact I couldn't get any pulse at the wrist when I first saw him and I gave him digitalis for a myocardial weakness of the heart, a condition affecting the heart muscles manifested by general prostration. I didn't

ascertain the condition of his kidneys at that time. I continued to treat him until February 19, 1929, and made twenty-nine calls during that time, twice a day until January 10 and once a day afterwards. I told Mrs. Stewart and the family that Mr. Stewart's heart and kidneys were affected; that it was a prostration with a history of influenza. I learned from talking with the family and later with Stewart himself that he had been feeling ill for a week or ten days or two weeks previous to my seeing him, which illness I diagnosed as a case of flu, from the history and the condition I found him in, namely, cold extremeties, very poor circulation, fingernails dark and stenotic, indicating a poor heart action. On the first trip I had no chance to find out anything about his kidneys. I later examined six ounces of his urine which gave a test of specific gravity, 605, albumen trace, sugar none, from which I concluded that the kidneys were not functioning properly and that he had kidney trouble known by the medical term of nephritis. After Stewart regained consciousness I talked to him more or less about his condition and told him he would have to ease up on his way of living, not try to do so much, take more rest and kind of take things easy so that his heart and kidneys could regain their strength; that they were not in very good condition; that he had overdone himself; that he had had the flu and must take more rest. Members of the family asked if it would be advisable to send for his son living on the West coast and I said Yes; I really did not expect him to recover. In looking him over generally after I had time to investigate I found that he had a very bad set of teeth, a marked case of pyorrhea, and recommended that he have his teeth extracted when we got him in condition. Dr. Glenn was called and he extracted Stewart's teeth while he was in bed. My record reads "February 19, 1929, patient [fol. 66] discharged, up and about, and able to go about his business. Still has myocardial insufficiency." I did not again treat Stewart professionally until April 13, 1932, when I again found him suffering from a condition I diagnosed as flu, cramps in his extremities, temperature 102, prostrated and unable to answer questions intelligently. I then continued to treat him until his death, May 31. He died of uremic convulsions, with a general diagnosis of nephritis, with complete suppression of the urine other than that obtained by a catheter. His heart condition was bad at that

time, his pulse had run up to 160, with a blood pressure of 190. I detected a weakened condition of the kidneys and heart about the 20th day of April, 1932. I cannot tell whether or not the condition I found him in on April 13, 1932, was a recurrence of the condition I found him in on December 27, 1928. I am familiar with the effects of a weakened heart such as I have described, on a man 61 years of age, and the history of cases of such heart trouble at such age is as a rule bad. During the first illness I also gave urinary and intestinal stimulants, everything to bring about a stimulation of the toxic in the body.

Cross-examination:

A severe attack of flu at any age might bring about a heart condition, but a man 61 years of age we look at more suspiciously than in a younger man. It can produce anything. A complete collapse of the patient. I found no symptoms of a coma. The patient was unconscious and my diagnosis later was that he was in a collapse following an attack of influenza. Coma differs from collapse. A person in a coma has an abnormal condition from which he will not quickly recover, and we find some pathology following it up often times. A man might run a race long enough to collapse and would not be in a coma. Mr. Stewart responded to my treatment very rapidly. He was semi-normal in two or three days. There is a difference betwe-n acute and chronic nephritis. An acute nephritis may come on and the patient recover, while in a chronic condition he does not completely recover. In acute nephritis the patient very often has a suppression of urine which is highly colored and the patient is highly toxic, has headaches, and is restless. I found the symptoms last mentioned in Mr. Stewart during his illness in 1928-1929. In chronic nephritis there may be a large output of urine, often in the early stage, and it might cast off a granular type with traces of [fol. 67] albumen higher. In Mr. Stewart during the first illness I found an intestinal condition and that the kidneys were affected. This may be present in a chronic condition but in the chronic stage we find more or less swelling of the extremities and I didn't discover any swelling in Mr. Stewart's ankles during the first illness. I didn't treat him after February 19, 1929, and don't know anything about his condition, professionally, between that time and April 13, 1932,

when I was called to see him again. There is a distinction between an acute and chronic myocarditis. If a patient has chronic myocarditis, he will go on and on, have fatigue and doesn't seem to have any pep or kick-off, he is not able to go about his work and do normal things he used to do. He is sick. If he has an acute attack and recovers he goes out and says he feels as well as he used to. I saw Mr. Stewart on the street during the late spring or summer of 1929 and he looked as well as a man of his age should look. I don't think a person ever makes a complete recovery from an attack of nephritis or myocarditis. A kidney or heart that has once been affected will be left in a weakened condition. Under those conditions I do not think a doctor, if he did not know, could tell if he was afflicted that way. He might have an acute attack of myocardia or nephritis and have a recovery from that and after two or three years have it recur after an attack of influenza, and during the period intervening there might have been times when he was normal to the extent I have defined. I cannot say in Mr. Stewart's case that his last illness was due to the illness he had in 1928-1929.

Dr. E. S. Edgerton was then called as a witness on behalf of plaintiff, and testified as follows:

I am a physician and surgeon, a graduate of Rush Medical School in Chicago in 1910 and have been practicing my profession in Wichita, Kansas, since that time with the exception of the first two years after graduating. I am a member of the Kansas Medical Association, a member of their Council for a number of years, and was president of the Association in 1930. I have heard the testimony of Dr. McComb here and from that testimony I think Mr. Stewart's illness in 1928-1929 impaired his heart and kidneys and that he must have had some permanent damage that would weaken him substantially. In my opinion a man 61 [fol. 68] years old having such an illness as described by Dr. McComb as that of Mr. Stewart in 1928-1929 would never completely recover and there would be the danger of a flare-up of the heart and kidneys on any slight illness that he might have. We have to list the heart as an organ whose function is more important than any other organ in the

body so far as health and life are concerned. For those reasons its integrity is important because the various other organs of the body depend somewhat on the heart's proper functioning to perform their duties. There is a close relationship between the proper functioning of the kidneys and the heart, and a weak heart might possibly make weak kidneys and vice versa. The chances of recovery from a condition such as Dr. McComb described Mr. Stewart's to have been in 1928-1929 are not as good and the degree of damage sustained therefrom would be greater in a man 61 years of age than in a younger person. I am an examiner for life insurance companies and have been for some time. I am familiar with the attitude of insurance companies toward the acceptance or rejection of a person 61 years of age or older with a history of heart and kidney trouble such as detailed by Dr. McComb. I have through my practice made reports of applicants for insurance wherein it was found that they had had a heart or kidney disorder such as Dr. McComb described as Mr. Stewart having had.

Q. If a man 61 years of age had made application to you for life insurance, ordinary life insurance, and had given you a history of an illness and disease such as Dr. McComb here described as Mr. Stewart having been afflicted with in 1928-1929, what action would you take upon such application?

By Mr. Keith: Object as being incompetent, irrelevant and immaterial and not within the realm of expert testimony.

By the Court: Overruled.

A. I would not recommend him for insurance.

By Mr. Keith: Object and move that the answer be stricken out as being incompetent, irrelevant and immaterial.

By the Court: Overruled.

By Mr. Keith: An exception please.

From the testimony as given by Dr. McComb with respect to both illnesses of Mr. Stewart, I believe that the two illnesses were so similar that one would have to say that the second illness was probably like the first one and involved the same organs to a degree, that the conditions

changed to a more chronic type but the manifestations might have been different due to the lapse of time, but I think the diseased organ, the diseased process was going [fol. 69] on. There would be periods of remission during that time when pathology is not as pronounced as at other times. It is possible that there were times between his first and last illness during which the ordinary physician examining him, his heart and urine, would not discover pathological findings sufficient to determine the existence of heart or kidney trouble at that time. The history that the individual gives of his complaints and the knowledge of his former ailments is of the utmost importance in arriving at a conclusion regarding certain organs of the body. This is particularly true of the heart, blood vessels and kidneys. There is not anything about certain diseased hearts and kidneys that an examiner can make out in the course of the ordinary routine examination made in ordinary life insurance examinations, but if there is a history of heart or kidney trouble then the company can follow it up in order to arrive at an opinion whether or not that individual would be a good life insurance risk. A man may have a particularly damaged kidney and at times may have nothing in the urine to indicate that and during certain treatments the *the* kidney may pass less albumen and so forth.

Cross-examination:

I never saw Mr. Stewart in his life time. There is a difference between acute and chronic nephritis and of acute and chronic myocardia. They are the same disease but the condition becomes less acute in the chronic stage. A person could pass from an acute to the chronic stage without knowing anything about it and not being aware that there was anything particularly the matter with his heart or kidneys. In the chronic stage of myocardia there would usually be shortness of breath. The chronic condition of the kidneys is not easily manifested in the urine. A man could have chronic nephritis severe enough to cause his death in thirty days time and it not be noticeable in the urine.

Q. Isn't it true that all of us are more or less afflicted with it (nephritis), and don't know it?

A. I would say less, and not a whole lot.
Q. Well, to some degree?
A. Yes, that is true, of anybody that has to suffer from wear and tear of ordinary life as we use it.

The purpose of the physical examination for life insurance is to try to point out to the medical officer of the company a picture of the applicant and in doing this questions are asked the applicant and his answers written down by the examiner and are taken into consideration by the [fol. 70] examiner in the physical examination. The physical examination is made by the doctor and pertains to the physical part of the body and he mails his report to the medical director of the insurance company. The average examination given an applicant for life insurance is about three-quarters of an hour. It depends on the history the applicant gives. It would be likely and possible that the insured Reese Smith Stewart could have been examined by five regular medical examiners in Wichita within a period of three or four months prior to his death, and in each instance given a thorough examination of his urine, heart and other features of his body and yet no trace be found there of nephritis or myocarditis, yet it would be possible that the patient would be aware of myocarditis or nephritis by the shortening of the breath on exertion and from disturbances in his chest from time to time and he would have less ambition for work than he had previously. The applicant could do no more than answer the questions and submit himself for examination and if he does that he has done all that is required of him.

Redirect examination:

I mean of course that the applicant answer the questions honestly and makes a full disclosure and submits himself to the examination, then he has done all he could do. I am quite certain that these examining physicians, knowing them as I do, if they had that history before them, they would not pass it up, and recommend such a man for life insurance. A microscopical examination of a specimen of the urine would disclose more than a chemical examination, but it might fail to show abnormalities upon which an infected kidney could be predicted. The pathological evidence of a nephritic condition varies from time to time ac-

cording to ones habits and the general condition of his heart.

Recross-examination:

There is no line of demarcation between the acute and chronic conditions of nephritis or myocarditis. They merge one into the other. In Mr. Stewart's case from the history given here I would say he recovered from the acute condition of myocarditis and nephritis after about thirty days of convalescence and then began a development of the chronic stage of the diseases, which would manifest itself in the impairment of his breathing. The kidney trouble may or may not manifest itself; if it did it would likely be [fol. 71] some swelling in his limbs. It would not necessarily impair his ability to walk. If it were of severe degree it would hinder him from mowing lawns, pushing a lawn mower, playing baseball, pitching horseshoes, shingling houses and things of that kind, but in a milder degree it might not be apparent. If it was that severe he of course could tell it.

Mrs. Loy L. Marvin was then called as a witness for the plaintiff, and testified as follows:

Live in Wichita. Met the deceased Reese Smith Stewart during the summer of 1929 in Mr. Keith's law office. It was after the 4th of July. Mr. and Mrs. Stewart entered and asked for Mr. Keith. Mrs. Stewart helped Mr. Stewart into a chair. Mr. Wilkinson was there and said he was surprised to see Mr. Stewart again and Mr. Stewart said he was surprised himself but that he was feeling so much better. We talked about his illness and they told us how terribly ill he had been. I don't recall that Mr. Stewart told me exactly what was wrong with him, but I remember he was very elated that he had gotten well. He said he had been terribly ill and that the medical doctors had given him up entirely but that his wife, who was a Christian Scientist, had through her prayers and the prayers of other Scientists brought him back to life. He appeared terribly weak and looked mostly like bone covered up with skin and his color was gray like stone and his eyes were sunken like two burnt holes in a blanket, he didn't have any teeth in his mouth; he was very weak and seemed like he needed

assistance and Mrs. Stewart assisted him up the steps when he left.

Cross-examination:

Mr. Stewart would come into Mr. Keith's office to consult him occasionally after that time. I have thought a good deal about Mr. Stewart's condition because it seemed unusual to me for a man to die and then come back to life.

Mr. L. E. Hogeston was then called as a witness for the plaintiff, and testified as follows:

Live in Wichita, 34 years old and have been driving buses for the streetcar company for about seven years; first met Reese Smith Stewart about 1926. I bought a place from him on a contract and he would come to see me occa- [fol. 72] sionally. His apparent condition of health was good at that time. He was a very ambitious man. He was always busy. I saw him at my place after he had the sickness in 1928-1929, either in the spring of 1930 or 1931, but I would not swear to the year. That was the first time I saw him after his illness, but he had been down to my place several times after his sickness. I was about a year back in the payments for the place and he wanted to renew the contract. I had a conversation with him at that time. He came down to the house there and I was a year back in my payments. He said, "My health is not very good," and to get the contract up to date so that if something happens it will stay out of court. He had walked from his car about a half or three-quarters of a block away; he showed weakness, was short of breath, seemed to be about out of breath. I would say this was in the spring of 1931. He complained of his heart, said his heart was bad. He didn't call it his heart, he called it the old pump, said the old pump was bad.

Cross-examination:

I say this was in 1931 because it was the same year I moved out and that was in 1931.

Dr. Cochems was called as a witness on behalf of the plaintiff, and testified as follows:

I live at Salida, Colorado, am a physician and surgeon and medical director of the American Life Insurance Com-

pany, have been such medical director since 1911 and I pass on applications made to the company for insurance. Applications of Reese Smith Stewart, plaintiff's Exhibits A, B, C and D, were submitted to me by The American Life Insurance Company to make a decision as to whether or not we would accept them and issue insurance policies thereon. I studied them and approved the applications upon the statements and answers contained therein, relying thereon.

Q. Assuming that Exhibit D had disclosed on the front part of it, and on its face, that the applicant had an attack of flu in December, 1928, beginning December 12, 1928, and from that he had a myocarditis and nephritis, and was down and under treatment of a medical doctor for a period of some seven weeks. I will ask you to state that assuming that the application had stated those facts and if you had known those facts, what action would you have taken on the application?

[fol. 73] A. We probably would not have accepted it until we had made a further investigation and examination and got further evidence.

Q. If you had made further examination, and it had developed that this applicant had the disability or disease that Dr. McComb testified to; you heard his testimony, did you not?

A. Yes, sir.

Q. Then what would have been your action on these applications?

By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and giving his personal opinion at this time on a past event.

By the Court: Overruled.

By Mr. Keith: An exception.

A. We would have rejected it.

By Mr. Keith: Move to strike out the answer as being incompetent, irrelevant and immaterial.

By the Court: Overruled.

By Mr. Keith: An exception.

Q. If Exhibit A had shown under Question 10 that the applicant had two other insurance policies when the application was made, one in the amount of Ten Thousand Dol-

lars, and one in the amount of Two Thousand Dollars, in force on his life, what action would you have taken?

A. I don't think it would have made any difference in the action taken on these applications, although it generally makes the insurance company suspicious that the applicant is taking too much insurance for some undisclosed reason.

which was received in evidence and marked plaintiff's Exhibit D, and which is in words and figures following, to-wit:

EXHIBIT "D"

Form 171—25-M—6-31 (Part II).

This examination must be made in private. Answers Must Be Written in Black Ink, the examiner to record in his own handwriting the answers of applicant to every question, and have applicant sign full name.

Answers Made to the Medical Examiner

In continuation of and forming part of application for insurance in The American Life Insurance Company of Denver, Colorado.

Personal History:

1. Applicant's full name, Reese Smith Stewart.
2. Date of birth? Nov. 4, 1868.
3. Race and nationality? American.
4. Have you ever occupied the same house or room with a tubercular person? No.

(If, so, state date and relationship of patient.)

[fol. 74] 5. State whether single married, widowed or divorced.

6. What, if any, changes in occupation or residence have you made, been advised to make, or contemplating making on account of your health? None.

7. Have you ever been in any way connected with the manufacture or sale of alcoholic liquors? No.

8. Give details of present occupation. Real Estate.

9. Have you ever been declined or postponed or limited by any insurance company? No.

Habits:

10. Do you now use, or have you ever used whiskey, wine, beer, or other alcoholic beverage? No. If so, to what extent?

11. Have you ever used them to excess or intoxication?

12. Do you, or have you ever used opium, cocaine, or any other narcotic or habit-forming drug? No.

13. Have you ever taken or been advised to take treatment for liquor or drug habit? No.

Health:

(The examiner is expected to use care and interested effort in developing all signs and symptoms, and admissions of previous illness or impaired health.)

14. Name below all causes for which you have consulted a physician in the last ten years:

Illness, Influenza. Number of Attacks, 1. Date, Feb. 28. Severity and Duration, Two weeks. Any Remaining Effects, No. Attending Physician's Name and Address, Dr. McComb, Wichita, Kas.

15. Are you now in good health, as far as you know and believe? Yes.

16. Has any medical examiner or physician expressed an unfavorable opinion as to your insurability or health? No.

17. Have you ever had, or been advised to have, any surgical operation? No.

18. Have you ever been under treatment in any hospital, sanitarium, asylum, or similar institution? No.

19. Has your weight increased, no, or deacreased, No.

20. (a) Are you ruptured? No.

(b) Is the hernia reducible?

(c) What form?

[fol. 75] 21. Have you ever had any of the diseases mentioned in item 4 of Part III? No.

22. Have you now, or have you ever had, any other diseases or any injury? No.

Give details, dates, etc., of any history noted above:

Family Record: In giving cause of death or ill health, avoid indefinite terms.

23. Father, Dead. Age, 77. Yr. of Death, 1917. Cause of Death, Old Age. How Long Sick? 1 mo. Mother, Dead. Age, 80. Yr. of Death, 1929. Cause of Death, Old age.

How long Sick, 1 mo. Whole No. Brothers, 3. Living. Age, 69. Health, good. Age, 48. Health, good. Age, 47. Health, good. Whole No. Sisters, 1. Living. Age, 55. Health, good.

24. Have there ever been any cases of insanity, tuberculosis, epilepsy or suicide in your family? No. Details?

25. If applicant is a woman the following questions must be answered.

a Give date of birth of your last child.

b Are you now pregnant?

c Have you ever had any miscarriages? (Give dates and details.)

d Are the menstrual functions now regular?

e Have you ever had a tumor or disease of breast, womb or ovaries?

f Is anyone dependent upon you for support? If so, give particulars.

g Husband's full name?

h Occupation of husband?

i Health of hubsand?

j Has he applied for insurance in this Company?

k In what other companies does he carry insurance, and in what amount?

I hereby declare that all statements and answers as written or printed herein and in Part I of this application are full, complete and true, whether written by my own hand or not, and I agree that they are to be considered the basis of any insurance issued hereon. I hereby authorize any physician or other person who has or may attend me to disclose to said Insurance Company any information thus acquired. [fol. 76] Dated at Wichita, Kansas, this 18th day of Feb., 1932.

Witness: O. C. McCandless, M. D.

Signature of Medical Examiner: —— ——.

Signature of Person Examined: Reese Smith Stewart, Applicant.

(Part III) Medical Examiner's Report

N. B. Examiners are requested to make a very careful examination of heart and lungs with stethoscope against the bared skin.

1. a How long have you known applicant? a Two days. b Are you related to him? b No.

2. a Does applicant impress you as healthy and vigorous? a Yes. b What is his apparent age? b 63.

3. a Physical defects or deformities? a None. b Impairment of sight? b No. c Impairment of hearing or discharge from ear? c No. d Have you found, after careful examination, any evidence of goitre, enlarged glands or other tumor? d Yes.

4. Has applicant ever had syphilis, stricture or any venereal disease? No.

5. Is there any alteration in the pupillary reaction or in knee jerks? No.

6. Are there any indication of disease of abdominal or pelvic organs? No.

7. a What is his exact weight? a 131½ lbs. b Exact height? b 5 ft., 7½ in. c Girth of abdomen? c 31½ in. d Girth of chest under vest? d Expiration 32 in. Forced inspiration 36 in. e Did you weigh applicant? e Yes. f Did you measure him? f Yes.

8. What is his temperature?(under tongue) 98 Degrees.

9. a Rate of pulse? a 76 per minute. b Is pulse irregular or intermittent? b Regular. Give details below.

10. Are the arteries thickened or sclerosed? Slight thickening. No sclerosis.

11. What is the blood pressure? Systolic 120 mm. Hg. Diastolic 68 mm Hg.

12. a Is the respiratory murmur clear and distinct over [fol. 77] every part of both lungs? a Yes. b Are the lungs free from every indication of disease? b Yes. (Diagram)

13. a Give location and character of apex beat. Indicate with an (X) on diagram the position of the apex beat in all cases. b Are the heart sounds and rhythm regular and normal? b Yes. c Describe any evidence from percussion or auscultation of hypertrophy or other disease of the heart. None.

14. Was your examination of heart and lungs made with stethoscope against bared skin? Yes.

15. Urinalysis: a Specific gravity, 1,026. b Reaction? Acid. c Clear or cloudy when voided? Clear. d Albumin? No. e Tests used? Ht. Acetic Ac. of Sugar? No. g Tests used? Benedicts. Make note of slightest trace of albumin or sugar found at any examination. h The specimen ex-

amined was voided in my presence at —a. m. 3:00 p. m. i Has anyone ever claimed to have found casts, albumin or sugar in the applicant's urine? No. j. Are you forwarding a specimen of the applicant's urine? Yes.

A specimen of urine must be forwarded to the Home Office for microscopical examination in every case when applicant is 50 years of age or over, or when amount applied for is $10,000 or over, or when spec-fic gravity is under 1012 or over 1028, or when there is previous history of kidney disease. Send specimen in case of any abnormal finding. Five grains of boric acid per ounce is recommended as a preservative.

16. Give your personal opinion of general physical condition. (Appearance, figure, color, vigor, general health, etc.) Gives appearance of excellent physical condition for age.

17. Is the risk first class, average or poor? If not first class, give details under remarks. First class. Remarks and explanations.

18. Are you satisfied as to the applicant's identity, and the substantial correctness of all answers? Yes.

19. Was any third party present at examination? No. (Examinations must be conducted privately, except where an interpreter is required.)

20. Give name of Agent who sent this applicant to you. Mr. Roy Otto.

I Certify that I have carefully examined Mr. Reese S. [fol. 78] Stewart of Wichita, Kansas, in private, at 3:15 P. M. this 18th day of Feb., 1932, that the statement of applicant on other side of this sheet is in my handwriting, and is exactly as made by the applicant to me, and that it was signed by said applicant in my presence.

(Signature of Examiner) O. C. McCandless, M. D. Examiner's postoffice address, 904 Schweiter Bldg., Wichita, Kas.

This report is strictly confidential between the examiner and the Company, and is not to be communicated to the Agent or to any other person, and when completed, is to be forwarded by the examiner to The American Life Insurance Company of Denver, Colo. (620 Denver Nat'l Bldg.)

DR. O. C. MCCANDLESS was then called as a witness on behalf of the plaintiff, and testified on direct examination as follows:

I am a medical doctor and have been practicing my profession in Wichita nine years. In February, 1932, I was medical examiner at Wichita for The American Life Insurance Company and on February 18, 1932, I had occasion to examine Reese Smith Stewart for The American Life Insurance Company. Mr. Roy Otto had the application of Mr. Stewart for insurance in that company and asked me to examine him. A few days later Mr. Otto brought Mr. Stewart to my office and I gave him the examination by asking him the questions and writing down the answers shown on Exhibit D which you have handed me. I asked Mr. Stewart the questions and wrote down the answers as he gave them to me. (Mr. Keith, for the defendants, admits that all the questions on Exhibit D were asked and that answers were given by Stewart as stated on the said Exhibit, except question No. 14 in Part II.) With respect to question 14 I asked Mr. Stewart to name all causes for which he had consulted a physician in the last ten years, and he gave me the illness of flu, one attack. He did not know the exact date, but stated tha was in February, 1928. I asked him the duration and said about two weeks as nearly as he could recall. I then asked him if there were any complications or remaining after effects and he said "no." I asked him if he had had a physician and if so, who it was and he told me Dr. McComb. I wrote down here just what he told me in answer to my questions. I signed [fol. 79] Exhibit D and Mr. Stewart signed it. Roy Otto was present when I asked the questions pertaining to the history of the case. Mr. Stewart did not say that he was in bed two or three weeks and confined to the house five weeks in addition.

Cross-examination:

I gave him a good thorough examination devoting 45 or 50 minutes to it. I tested his heart by using the stethoscope on the bare skin and I did not detect any impairment of the heart. His heart was apparently normal with nothing to arouse any suspicion as to its soundness. I examined his urine for kidney trouble and found no trace of nephritis. His kidneys seemed to be all right. I forwarded

to The American Life Insurance Company at Denver a sample of his urine.

Redirect examination:

Q. Assuming that the answer to question fourteen, that the applicant Mr. Stewart had told you that he had had heart and kidney trouble in 1928, or 1929, and that he had been down and under the care of Doctor McComb for a period of something like seven weeks, and had been treated for his heart and kidneys, would that have influenced your action in any way?

By Mr. Kieth: Object as being incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

By the Court: Overruled.

By Mr. Keith: An exception.

A. I would have made,—Yes, it would have made a difference. I guess that answers your question. —

Q. What difference would it have made

By Mr. Keith: Object as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

By the Court: Overruled.

By Mr. Keith: An exception.

A. Well, in case of a history of heart disease, or kidney disease, I would have taken one or two alternatives; since they were negative findings, for the benefit of the applicant, we would have either gone into a further test, or further examination, or if the facts warranted, would have disqualified the man from taking insurance.

By Mr. Keith: Move to strike out the answer as being incompetent, irrelevant, and immaterial; stating a conclusion of the witness on past events.

By the Court: Overruled.

By Mr. Keith: An exception.

Q. Would you have put that information on the application blank?

A. Yes, sir.

By Mr. Keith: Object as being incompetent, irrelevant, and immaterial; a statement of past events calling for a conclusion of the witness.

By the Court: Overruled.

By Mr. Keith: An exception.

A. Yes.

[fol. 80] Q. Would that information if you had received it, what effect would it have had upon your recommendation for life insurance?

By Mr. Keith: Object as being incompetent, irrelevant and immaterial; calling for a conclusion.

By the Court: Overruled.

By Mr. Keith: An exception.

A. Of course, I would not have rated him first class.

Q. What would you have done?

By Mr. Keith: The same objection.

By the Court: Overruled.

By Mr. Keith: An exception.

A. I would have either put in remarks my opinion that further examination would be necessary, and I would have put down the degree of risk I thought he should have had.

After taking application, Exhibit D, it was sent to the insurance company.

Recross-examination:

I know the usages and customs of insurance companies generally, with reference to examinations. The reference in Question No. 14 in Exhibit D to attending physician's name and address is usually asked so that the companies may make inquiries from attending physicians of illnesses referred to. I don't know whether it is the usual custom for insurance companies to make such inquiries but I have been asked myself about particular patients and have received frequent letters of insurance companies where my patients have been listed in applications of insurance.

Redirect examination:

Q. In view of the answer that was given to you by Mr. Stewart, and history of former illness and the conversation that you had with him, do you think your suspicion, or an examiner's suspicion would be aroused to warrant the calling of a doctor who was in attendance at the time of his illness?

A. The attack of flu alone would never turn anyone down for life insurance, for a life insurance policy. Complications would excite or arouse suspicion for inquiry.

Just the statement of flu for two weeks would not arouse my suspicions.

Recross-examination:

We may have involvements of muscle tissues following cases of the flu and sometimes it is so severe that it causes the death of the patient in a very few days. In an acute attack of the flu very frequently we find symptoms in the urine that we know are only temporary and in a few days [fol. 81] they pass off. We look for them and if we don't find them, we look of course for other symptoms. If a patient had an acute attack of myocardio and nephritis and he apparently recovered from it in three months there wouldn't be anything to excite his suspicions unless it recurred. He would be misled just as well as the examiner for the insurance company.

Redirect examination:

Flu may cause any sort of complications or after effects. Of course, the older the patient, naturally they have less power of recovery. Other complications may follow an attack of flu such as pneumonia and encephalitis. That is why we inquire as to the history.

(This concludes plaintiff's direct testimony.)

Defendants' Evidence

Roy H. Otto, called as a witness by the defendants, testified as follows:

Live in Wichita, Kansas, and am now agent for the Farmers & Bankers Life Insurance Company, selling insurance. In February, 1932, was employed by The American Life Insurance Company in the same capacity and worked under D. M. Parfet, supervisor of agents. Was acquainted with Reese Smith Stewart for ten or fifteen years immediately preceding his death. About the 1st of February, 1932, I solicited Mr. Stewart to take out insurance in The American Insurance Company and took D. M. Parfet to Mr. Stewart's home for that purpose. There was not much done on our first visit. He said he was not

interested but would be glad to give me the business. We went back again a week later and talked insurance with him 30 or 40 minutes. But he said he couldn't buy any because he was waiting to sell some property before taking out any more insurance. Mr. Parfet and I called on Mr. Stewart again February 11th, 1932. Mrs. Stewart admitted us and we all sat down in the living room and we asked Mr. Stewart if he had closed any property deals and he said no, but that he expected to close one in the next few days. We suggested that we could take his application for insurance and by the time the policy came back he would have his deal completed and then have the money to pay for the insurance. Mrs. Stewart objected, saying that we had [fol. 82] better wait until we found out whether Mr. Stewart closed the deal, but Mr. Parfet assured them that it would be all right and they could make settlement after the policy arrived. They consented to that arrangement and Mr. Parfet proceeded to take the application right there where we were sitting, filling in the application blank on the arm of the chair that Mr. Stewart was sitting in. We did not go into the dining room at any time while we were there on that occasion. Mr. Parfet asked the questions on the blank and Mr. Stewart answered them. I heard all the questions read and the answers that were given by Mr. Stewart: I heard Mr. Parfet ask him how much insurance he had in force, and in answer to that question Mr. Stewart said he had a Two Thousand Dollar Woodmen policy, a Ten Thousand Dollar Prudential policy, and a Twenty Thousand Dollar American Life that he had filled out; that he had some trouble with a Mr. Scott, and Mr. Scott wrote the order for him, to correct his name, Ten Thousand Dollars on Reese Smith, Junior. In answer to a question of what insurance he had applied for Mr. Stewart said that he had applied for a Five Thousand Dollar policy in the New York Life Insurance Company and a Five Thousand Dollar policy in the Metropolitan Life Insurance Company; that these policies would be submitted to him for inspection and if they suited him he was going to take them, but since I was in the insurance business he would like to give me the business. Mrs. Stewart remained there during the entire time the application was being taken. She was sitting where she could hear all that was said while the application was being taken. Mr. Stew-

art's health was good at that time. I saw him frequently before he made this application and on an average of once a week from that time until his death and during the time last mentioned I did not notice any apparent change in the condition of his health prior to his last illness. I recall his sickness in 1929 and was at his home during his illness and saw him about once a month during the summer and fall of 1929. During the summer and fall of 1929 he appeared all right to me. In 1930 I saw him frequently and I would say that I saw him four or five times during 1931 and at no time after his illness in 1929 did I see him when he was not in a good condition of health. Mr. Parfet sent his application in to the home office at Denver and on his own initiative Mr. Parfet wrote a letter to the company accompanying the application, explanatory of the New [fol. 83] York Life and Metropolitan policies Mr. Stewart had applied for. I took Mr. Stewart on February 18, 1932, to Dr. O. C. McCandless' office for medical examination in connection with the application that he had given us and after Dr. McCandless finished the examination I asked the doctor if Mr. Stewart was O K and he said "fine" and then I suggested to Mr. Stewart that he should buy another five thousand dollar policy while he was physically fit and make his son, Reese Smith Stewart, Jr., beneficiary and he said if we could do it on the same basis as the other policy was arranged for he would do it. So I took him to our office and asked Mr. Parfet about it and he said he saw no reason why it could not be done. The second application was then taken by Mr. Stewart signing an application blank with the understanding that his answers to the questions on the first application would be considered answers to the questions in this application with a fill in for change of beneficiary, amount of insurance applied for, Five Thousand Dollars, kind of policy, ordinary life, annual premium, $346.50, beneficiary, Reese Smith Stewart, Jr., age 18, son.

Cross-examination:

I was the agent and signed the application blanks (Exhibits A and C) and got the credit for these two policies. I left the employment of The American Life Insurance Company about the first of July, 1932. I refused to talk to you (Mr. Gott) about the matter and refused to tell you

what happened. I took a note for Mr. Stewart's insurance, payable to myself, and remitted the net premium to The American Life Insurance and kept the note. After Mr. Stewart's death a representative of the company offered to take up the note from me and I refused to sell it to him.

Q. Notwithstanding these applications, you claim do not disclose the answers that were actually given, you signed as agent, did you not?

A. Yes, sir.

Q. They recite that you have asked the questions and set down the answers, just as they were given to you, do they not?

A. Yes, sir.

Q. You signed these applications and allowed them to go into the Home Office too, when you claim that you knew that they did not state the facts?

A. Yes, sir.

Redirect examination:

I did not know at the time that the application did not state the facts as given by Mr. Stewart. I did not read it after it was completed, nor was it read to me or Mr. Stewart [fol. 84] before he signed it. I was present and heard Dr. McCandless read the questions to Mr. Stewart in the medical examination and heard Mr. Stewart's answers. I recall the question being read as to what disease he had had during the last ten years and that Mr. Stewart said that he had had the flu in February, 1929. As to duration of time I think he said that he was bedfast two weeks and was at home for five or six weeks thereafter and that Dr. McComb had attended him.

Mr. R. C. Clevenger was next called as a witness by the defendants, and testified as follows:

I am president of the Fourth National Bank in Wichita. I knew Reese Smith Stewart from the time he came to Wichita until he died, and for a number of years I would see him once a week and probably as often as once a month during the years 1929, 1930 and 1931 until his death.

Q. Do you know his reputation in this community for uprightness?

By Mr. Gott: Object as being incompetent, irrelevant and immaterial and not within the issue of this case.

By Mr. Keith: I think it is an issue. He can't be here to appear as a witness. There is an exception to this rule, and I have some authority.

By the Court: I think I will permit it to go in and hold my ruling in abeyance.

A. Yes.

Q. What is it?

By Mr. Gott: Same objection to this line of testimony. I think all testimony with respect to his general reputation is incompetent, irrelevant and immaterial.

By the Court: I will permit him to answer, and decide later whether I will give it any consideration.

Mr. Stewart's reputation for truth and veracity, and honesty, in this community, was good.

Cross-examination:

I knew Mr. Stewart in Missouri before he came to Wichita. He came from Cameron, Missouri, and I came from Gallup, about 20 miles from Cameron. He was quite a trader and able to take care of himself in a business way. I have made bank loans to him and the last of them were rather hard to collect.

Redirect examination:

Mr. Stewart brought considerable money with him when he came to Wichita and deposited it in my bank. I dealt [fol. 85] with him a good deal and never had any trouble with him until along at the last.

Recross-examination:

He was not as well fixed at the time of his death as he had been before.

By the Court: You are speaking of 1932? I wonder if the court can't take judicial notice that it was hard for all of us to borrow money during those times.

Redirect examination:

I notice from my record here that he paid us off in November, 1931. It was hard for most anybody to pay along about that time.

FRANK S. FRISBIE, called as a witness by defendants, testified as follows:

I am superintendent of the Prudential Life Insurance Company, Wichita, and have been in their employ twenty-five years. I knew Reese Smith Stewart during the last ten years and a half of his lifetime and have had business transactions with him. He made an application for insurance to our company in the latter part of 1931 or early in January, 1932. He made an application for this insurance in the usual form of questions and answers and there was an examination taken. The insurance was issued and at that time he had a Ten Thousand Dollar policy in our company which was issued in 1920. I saw Mr. Stewart occasionally during the years 1929-30 and '31. I knew of his illness in 1929 and called at his house and saw him when his illness began and observed his apparent physical condition. The next time I saw him was in the summer or early fall of 1929 August or September. He came to my office and he then looked normal, looked as well as he had previous, and he told me, I believe, that he was feeling fine. I don't remember of noticing any ill effects of the illness after I saw him at his home in the beginning of the illness. He was an active man and stepped around pretty lively. I didn't take his application, but it came through my hands by one of our men.

Q. Do you know the reputation of Reese Smith Stewart in this community in 1932 and prior thereto for uprightness in business?

By Mr. Gott: The same objection to this question and all like questions that was made to the previous questions along this line.

[fol. 86] By the Court: He may answer, ruling reserved, and exception taken.

Q. What was it?
A. It was good.

His general reputation for truth, integrity, honesty and veracity was good.

MR. FLOYD DEVORE, called as a witness by defendants, testified as follows:

I am treasurer of The Citizens Finance Company which has operated in Wichita since 1925. Became acquainted with Reese Smith Stewart in February, 1929, and had frequent business transactions with him until the time of his death.

Q. Do you know his reputation in the community in 1932, and prior thereto, for uprightness in business?

By Mr. Gott: Same objection. I want to ask the court if it is necessary to repeat my objection from time to time to this line of examination.

By the Court: No, I will consider this testimony all together.

By Mr. Gott: I mean, may we have our exceptions if the ruling is adverse to us and vice versa?

By the Court: Yes.

A. Yes, it was good.

His reputation for truth, integrity, honesty and uprightness in business was good.

ELMER C. MOORE, called as a witness by defendants, testified as follows:

I am salesman for the New York Life Insurance Agency at Wichita; been in their employ since September, 1924, as agent at Wichita. I knew Reese Smith Stewart from about the 15th day of January, 1932, until the time of his death. On the 22nd of January, 1932, I obtained his application for a Five Thousand Dollar policy in the New York Life Insurance Company. His application was made by questions asked and answers given on the usual blanks. There was a physical examination and the policy was issued to Mr. Stewart. On March 15, 1932, I obtained another application from Mr. Stewart for Ten Thousand Dollars in the New York Life Insurance Company. There was no physical examination at that time as the period had not run out on the original medical, but there was a health certificate made out by our medical examiner, J. S. Coleman,

on the date of the delivery of the policy on March 25, 1932. About the 15th of January, 1932, I visited Mr. Stewart at his home and talked with him and his wife and as far as [fol. 87] I could tell his health was all right at that time. I never detected anything about his health until I met him on the street on the 15th day of April, 1932, when he appeared to be a very sick man.

Q. Are you acquainted with his reputation in this community for truth, veracity, honesty and integrity, in 1932?

By Mr. Gott: Same objection as previously.

Court: Ruling reserved, and exception taken.

A. Yes, it was good.

Cross-examination:

I first met Mr. Stewart by appointment. Prior to January 15, 1932, he called at our office and talked to our cashier relative to selling a home, and he said at that time he was considering the purchase of life insurance. His name was given me as a prospect for insurance. The premium on his policies was payable quarterly and I took notes for the first premium.

Redirect examination:

Mr. Stewart told me that he wanted the premiums arranged so that the heavy note would come due in August. He said that he had some money coming about that time on notes that were owed to him. The premiums on his New York Life Insurance policies were paid satisfactorily to me and the company.

Recross examination:

Mr. Stewart had paid two premiums of one hundred twenty dollars and twenty-five cents each on the Five Thousand Dollar policy. He told our cashier he was in the market for insurance.

John Daniels, called as a witness by defendants, testified as follows:

I am assistant manager for the Metropolitan Life Insurance Company at Wichita. Was acquainted with Reese Smith Stewart from January, 1932, until his death. I

wrote his application for a Five Thousand Dollar life insurance policy in the Metropolitan Life Insurance Company on the regular form with questions asked him and his answers written down. There was the regular medical examination in connection with this application and the policy was issued to him.

Q. You were acquainted with Reese Smith Stewart's reputation for uprightness in business at that time?
[fol. 88] By Mr. Gott: The same objection as formerly.
Court: Same ruling, and exception taken.
A. Yes, sir, it was good.

I made inquiry in this community with regard to Reese Smith Stewart, Senior's reputation for uprightness, integrity, honesty, at the time I had the aforementioned business transaction with him. And from those inquiries, that his reputation for truth, honesty and integrity was good.

Cross-examination:

Mr. Stewart asked whether or not we would issue another policy. I wrote the company and asked if they would issue a duplicate policy and they answered that they felt that the man, the age he was, had sufficient insurance.

Redirect examination:

That was after April 1, 1932.

Mr. J. J. Parkinson, called as a witness by defendants, testified as follows:

I have been engaged in the grocery business in Wichita for twenty-four years at a location about four blocks distance from the home of Reese Smith Stewart, Sr. I knew Reese Smith Stewart twelve or fifteen years immediately prior to his death. He was a customer at my store and I saw him frequently when he would come to buy groceries. I knew of his illness in 1929, but don't recall of his ever being sick at any other time, except his last illness. He commenced to come back to my store as a customer about six weeks or two months after his sickness in 1929 and he continued to come there two or three times a week until his last illness. When he first came back after his flu attack

he looked pretty bad and I laid that to the fact that he was without his teeth. Afterwards he seemed to get around all right. He turned to his regular line of occupation the same as before. He seemed to be back to normal and continued in that condition practically up until the time of his death. Regarding the condition of his health before and after his illness, so far as I could tell he got back to practically his previous condition. I am answering as a layman, you understand.

Q. Do you know his reputation in this community for uprightness in business, in 1932, and prior thereto?

[fol. 89] By Mr. Gott: Same objection as previously.

Court: Same ruling, and exception same.

A. Yes, sir, it was good.

Mr. Paul Watson, called as a witness by defendants, testified as follows:

I am manager of the Central Supply Company, engaged in the lumber business, since August, 1929, at Wichita. I was acquainted with Reese Smith Stewart, Sr. for about ten years immediately preceding his death. He was a customer of our lumber company. Prior to his illness in 1929 his health was apparently good. I saw him three or four months after February, 1929, and every day during the summer and fall of 1929 and during 1929, 1930 and 1931. He would come in every so often to see about the purchase of materials for his places. The last time I recall seeing him was in December, 1931, when he came in and paid his account with us. He was then in apparently good condition of health and had been apparently in good health since the early summer of 1929. When he came in in December, 1931, he seemed to be in fairly good health.

Q. Do you know his reputation in the community for uprightness in business in 1932, and prior thereto?

By Mr. Gott: Same objection as previously stated.

Court: Same ruling, and exception taken.

A. Yes.

His reputation for honesty, integrity and truth and veracity was very good.

ORA INEZ STEWART, defendant, testified as follows:

I am the defendant in this action and the widow of Reese Smith Stewart, Senior, fifty-nine years old, married to Mr. Stewart for forty-three years and we have lived in Wichita since 1919. Prior to that time we lived in Cameron, Missouri, where Mr. Stewart managed his farms and properties, worked in a lumber yard and handled real estate. We lived on a farm for twenty-five years when we were first married and he performed all the usual labors on the farm. He was an active man and had no sickness of any severity prior to the flu attack in 1929. I was personally familiar with the properties that Mr. Stewart owned in Wichita and assisted him in the management of these properties, and during the latter years of his life I acted as his secretary and helped him to attend to his business and often dis- [fol. 90] cussed the condition and value of his properties, and from my contact with these properties and my discussions with Mr. Stewart I know the approximate values of his Wichita real estate in 1932 and the incumbrances that were on these properties, also rentals received from them. I am now handling the rental of the properties and have figured out the net income from them prior to and since his death. In the latter part of 1931 and early part of 1932 and until the time of his death he owned the following property located in the City of Wichita, Kansas:

No. 2920 East First Street. A two-story frame, 12-room house. Valued in the spring of 1932 at Seven Thousand Dollars, with Three Thousand Dollar incumbrance and rental income of Sixty Dollars a month, which net us Forty-five Dollars a month after taking out expenses for light, water, gas and taxes.

No. 309 North Hillside, Wichita, Kansas. A large frame house made into six apartments, valued in the spring of 1932 at Seven Thousand Dollars, with Three Thousand Dollar incumbrance. This property produced and produces an income from rents of $125.00 a month with a net income of $100.00.

No. 304 South Rutan Avenue, Wichita, Kansas, A five-room house valued in the spring of 1932 at Thirty-five Hundred Dollars with Twelve Hundred Dollars incumbrance. Producing then and since $35.00 per month. Furnished with our own furniture. This property net us $25.00 per month.

No. 826 South Lawrence Avenue, Wichita, Kansas. A double duplex, frame dwelling, valued in spring of 1932 at Fifty-five Hundred Dollars with an incumbrance of Twenty-two Hundred and Fifty Dollars. This property then and now rents for $54.00 a month, with a net income of $45.00 per month.

No. 623 South Hydraulic. A seven-room duplex, frame dwelling house, valued in spring of 1932 at Thirty-five Hundred Dollars with about Twelve Hundred Dollars incumbrance. This property then and now rented for $44.00 a month, netting $35.00 a month.

No. 534 New York Street, Wichita, Kansas. A six-room frame house. Valued in the spring of 1932 at Thirty-five Hundred Dollars with Twelve Hundred Dollars incumbrance, rented then and now for $25.00 net income.

[fol. 91] No. 1931 South Topeka Avenue, Wichita, Kansas. A four-room efficiency apartment. Valued in the spring of 1932 at Thirty-five Hundred Dollars with Twelve Hundred Dollars incumbrance. A monthly income from rents of $25.00 net.

No. 1735 Ellis Avenue, Wichita, Kansas. A three large room frame house, semi-modern, with 4 lots and a double garage. Valued in spring of 1932 at Twenty-five Hundred Dollars with Nine Hundred Dollar incumbrance and a monthly net income of $16.00 a month from rents.

Five vacant lots on Wellington Place, Wichita, Kansas. Valued in spring of 1932 for Five Hundred Dollars ($500.00) with no incumbrance.

The total estimated value of these properties in the spring of 1932 was Thirty-six Thousand Five Hundred Dollars ($36,500.00) with a total incumbrance thereon of Nine Thousand Nine Hundred Fifty Dollars ($9950.00), producing a gross rental income of $384.00 a month with a net income of $316.00 per month. Expenses for taxes nd insurance amounted to about $700.00 per year. Mr. Stewart's total value of his equities in these properties in the spring of 1932 was Twenty-two Thousand Five Hundred Fifty Dollars ($22,550.00) and his net yearly income after taking out the taxes and expenses was Three Thousand Ninety-two Dollars ($3,092.00).

Mr. Stewart was taken sick with an attack of influenza in the latter part of December, 1928. He had been complaining of and had had a severe cold for about two weeks but

kept out and tending to his business every day. I called Dr. McComb on the 27th day of December, 1928. Mr. Stewart remained in bed from that illness two or three weeks and I would say two or three weeks more in the house afterwards. On the 18th day of February, 1929, he went to the Fourth National Bank in Wichita to see about a deposit. On the 28th day of February, 1929, he went down town to the Jayhawk Tire Company and bought a tire for his car and from that time on he went out to see about his properties and to collect the rents as he had previously done. He would drive his car and later when the time came to mow lawns he did the work and mowed the lawns at about four or five of those places along in May and June, 1929. I often accompanied him and saw him do this work. He would [fol. 92] usually work at it until he had finished a lawn and occasionally he used his sickle and scythe when the grass was high and hard to cut. I saw him swing his scythe during the summer of 1929 and showed no unusual fatigue or exhaustion in doing this work. In August, 1929, he sold one of his properties at No. 624 South Main Street, Wichita, for Six Thousand Dollars cash. He began working with a carpenter in October, 1929, to repair some of his houses and then with a painter to follow that up. I was present when he was doing some of this work. We did repair work on the property on South Hydraulic Avenue together in the year 1931. Mr. Stewart plastered the ceiling, did some work in the kitchen, took out a window, put in a door, while I was present. I recall occasions in the fall of 1931 when he worked on his properties at 826 South Lawrence Avenue and 623 South Hydraulic Avenue. We cleaned off the floor, using a varnish remover and cleaner and took off all the paint and then varnished it. Mr. Stewart did the hard part, he used the cleaner and got down on his knees and worked and scrubbed until he got the varnish off. On another occasion he painted the house on Hydraulic Avenue and assisted the carpenter in taking off the front porch and putting on a new one. Mr. Stewart did the work of fixing the floors and painting, and on another occasion about that time he made full size screens at No. 534 New York Street, Wichita, and did all the work himself, and during that time he also cut down trees and shopped wood. On one occasion cleaning up the lots on Wellington Place where the house had

burned and there was quite a lot of work there and at home he filled the basement full of wood, using the axe and saw both. During the latter part of 1929, 1930 and 1931 he would pitch horseshoes about once a week and play baseball every time he got a chance and in the fall of 1931 I remember a real interesting ball game in which he participated, playing in different positions and would bat and run around the bases and run after the ball like the other players, without showing any degree of exhaustion from the effort. I didn't notice any difference in his activities after he had apparently recovered from his illness in 1929 until the time of his last sickness, from what they had before the first illness.

I was present when Roy Otto and Mr. Parfet came out to take his application for insurance in February, 1932. They [fol. 93] first came February 1st, 1932. I admitted them and Mr. Otto introduced Mr. Parfet to Mr. Stewart and Mr. Otto reminded Mr. Stewart that he was in the insurance business and if he took out any insurance he would like to have the business. Mr. Stewart said that he had been figuring on turning his real estate into insurance, as soon as he could make the deals, and that he was not ready right then to do it. They came back again about the 6th of February and we had a friendly discussion about business affairs and considerable talk about insurance. Mr. Stewart told them something more about his real estate deals, that he was trying to sell two or three of his houses and they told him about their insurance policy, but he said he was not ready yet to take the insurance. They came back again in the evening of February 11, 1932. I admitted them and we all sat down around the fireplace and I stayed there all the time they were there. They talked about life insurance and Mr. Stewart's real estate deals and asked if he had closed any yet. Mr. Stewart said that he had a customer for his Rutan place but hadn't realized on it yet. Mr. Parfet insisted on his taking the insurance then, stating that they would take his note for it until he sold the property and at last Mr. Stewart told them that he would give them an application and take the policy if they could manage it that way. Mr. Parfet immediately got out his application blank and put it down on the arm of Mr. Stewart's chair and began asking questions. I was sitting close and paying attention to what was said and heard all the questions asked and answers given. In answer to a question in regard to

what insurance he then had pending Mr. Stewart said he had Five Thousand Dollars with the New York Life Insurance Company and Five Thousand Dollars with the Metropolitan Life Insurance Company for examination. In answer to the question as to what insurance he had in force he said he had a Ten Thousand Dollar policy with the Prudential Life Insurance Company that had recently been changed from a term policy to life, and that he also had taken out a Two Thousand Dollar accident policy with the Prudential Life Insurance Company, double indemnity clause, and that he had a Two Thousand Dollar policy with the Modern Woodmen of America. While the application was being taken, there was some discussion about the policies Mr. Stewart had previously taken out for Reese Smith Stewart, Junior. Mr. Stewart had no sickness whatever [fol. 94] that confined him to the house at all from the time he got out in 1929, up until his last illness.

Cross-examination:

I was appointed executrix of Mr. Stewart's estate and in the Probate Court proceedings I made a sworn report in March, 1933, as to the valuation of the property that Mr. Stewart left at his death, for inheritance tax purposes.

(Witness identifies plaintiff's Exhibit E as the report which she swore to before a notary public.)

Plaintiff's Exhibit E shows:

EXHIBIT "E"

Description of Real Estate Belonging to Said Estate

Lot No.	Block No.	Street	City	County	State	Appraisal Value
Lots 40 and 41		First St.	Wichita	Sedgwick	Kansas	6,000.00
N. 53' of Lots 119 to 126 Inc.		(Second St. (Maple Grove Add.	"	"	"	5,000.00
S. 16' of Lot 3 and N. 17' of Lot 5		(Rutan Ave. (Knight's Sub-Div. (of Block 1	"	"	"	2,500.00
Lots 223 and 225		Hydraulic Ave. Burr's 2nd Add.	"	"	"	2,500.00
Lots 13, 15, 17 and 19		Ellis Ave. Mead's Sub-Div.	"	"	"	1,000.00
S. 10' of Lot 7; all of Lot 9 and N. 15' of Lot 11		On Topeka Ave. Stanley & Morrison's Add.	"	"	"	2,500.00
Lots 40 and 42		New York Ave. Shirk's 3rd Add.	"	"	"	2,500.00
Lots 5, 6, 7, 8 and 9		Sunflower Add.	"	"	"	375.00
		Total Value of Lots				22,375.00

Plaintiff's Exhibit E further shows:

Statement of Indebtedness Owed by the Estate and Secured by Mortgage on Real Estate

Name of County or City	Legal Subdivision	Section Lot	Range Twp. Block	Amount
Wichita, Sedgwick Co.	No. 2920 E. 1st St.			$3,589.59
" "	No. 309 N. Hillside Ave.			3,300.00
" "	No. 304 S. Rutan Ave.			1,900.00
" "	No. 623 S. Hydraulic Ave.			1,400.00
" "	No. 1735 S. Ellis St.			900.00
" "	No. 1931 S. Topeka Ave.			1,000.00
" "	No. 534 New York Ave.			1,000.00

The indebtedness listed immediately above is mortgage indebtedness owed by the estate on the above-described real estate blonging to the estate.
[fol. 95] The estate owns no indebtedness secured by mortgage on real estate.

(Said Exhibit E shows the net value of real estate owned by Stewart at the time of his death to be $9,285.41 and the total value of all goods and chattels to be $1,310.00.)

Redirect examination:

Exhibit E does not contain the South Lawrence Avenue property which Mr. Stewart owned in February, 1932. This property was valued at $5,500.00 with a $2,200.00 incumbrance. In appraising the properties in the inventory marked Exhibit E the values were fixed at what they could have been sold for at the time of Mr. Stewart's death and the value of the properties given by me now in my testimony here are based on what Mr. Stewart estimated the places to be worth at the time he was applying for this insurance.

Reese Smith Stewart, Junior, defendant, testified as follows:

I am twenty years old and a son of Reese Smith Stewart, deceased. Lived at home all my life. I do not know of any instance when my father was down sick prior to the attack of flu in 1928-29. He was a very active man. He would take care of all his properties and personally mow the lawns, make repairs and do all kinds of work around the places. He was out of the house in March, 1929, and in two months after his illness with the flu he resumed his normal

activities. He and I took care of the lawns and yards of four places during the summer of 1929 and in doung this work father would use the moving scythe and hand sickle and take his turn using the lawn mower and in the fall of 1929 father and I covered the roof at 623 S. Hydraulic Avenue with tar which had to be spread over the roof. I had worked with him before the illness and I noticed no difference in his labor after the illness than before. We shingled the roof at 304 South Rutan: There was a carpenter stationed on the roof and when he needed a bunch of shingles father carried them up to him on his shoulder, and during the fall and winter months of 1929 and '30 and '31 and '32 father and I would cut up and prepare a supply of wood for winter use, father using the axe and saw and helping to carry the wood into the basement. I would say we put up six cords of wood in this way each winter aforementioned. [fol. 96] Father was quite proud of the fact that he could use the axe better than I could and he would usually use the axe and I would do most of the carrying. Father pursued his usual activities in regard to caring for and making repairs on the properties during the years 1930 and 1931 and I know of no occasion during that time when he hesitated in doing or ceased doing or neglected to do any work on account of physical inability. My father loved to play horseshoes and baseball and after his convalescence from his illness in 1929 he would pitch horseshoes at least once a week and would engage in a baseball game once a month on an average. In playing baseball we played what is known as "work-up" and father was the mainstay of the game. We used an indoor baseball and would go out to some of the parks and either choose up sides or play work-up and he always tried to get to be pitcher, and he worked up. He would bat the ball and run around the bases. Father was about sixty years old at that time.

Mr. Howard Cowan, called as a witness by defendants, testified as follows:

I am a plumber and have been engaged in the plumbing business in Wichita, Kansas, for the past 15 years. I knew and worked for Reese Smith Stewart during his lifetime. In October, 1929, I connected up a gas stove for him at

2920 East First Street, Wichita. He brought the stove up out of the basement or storage and acted in the capacity of helper for me and I noticed no impairment in his physical condition on this occasion. January 14, 1930, I put in a new hotwater heater for him at 2920 East First Street, and on this occasion Mr. Stewart assisted me by emptying the tank and carrying out the water. I was on this job about one hour. On February 1st, 1930, we repaired a waste line at 826 South Lawrence Avenue. We had to run some cast iron soil pipe and Mr. Stewart assisted me. This job took about one hour. He was also present and helped me repair a toilet at No. 534 New York Avenue April 2nd, 1930, which took about one hour and a half, and on May 16th, 1930, we changed stoves at 524 New York Avenue. We took a heater out of the front room into the dining room and Mr. Stewart helped me carry the circulator weighing about 200 pounds into the dining room. September 26th, 1930, he helped me [fol. 97] install a new heater at 623 South Hydraulic Avenue. On February 20, 1931, he assisted me in taking down and plugging a boiler. On August 10, 1931, we repaired a leak in a hot-water boiler at 304 South Rutan which required about an hour and a half, and on October 17, 1931, we ran two gas openings in his property and in doing this work he moved the furniture and lifted the rugs and acted as a helper for me generally. October 28, 1931, we did some general repair work, reseated a closet bowl and put in a new heater coil on South Lawrence Avenue. On November 9, 1931, we changed some stoves. We moved a stove from his home to 1723 South Ellis. He would pick up and help carry the stoves. December 8, 1931, I replaced a gas log in one of his properties and on this occasion he picked up and carried a gas log weighing 85 pounds. December 12, 1931, I repaired a heater at 826 South Lawrence and Mr. Stewart emptied the heater. April 4, 1932, I was called to repair a water leak at 1725 Ellis Avenue, Wichita, and on that occasion Mr. Stewart did a part of the digging that was required to get at the trouble. In all this work Mr. Stewart moved around pretty lively and I never knew him to hold back by reason of his physical capacity.

Cross-Examination:

The stoves that Mr. Stewart moved around were nearly all gas stoves, but one was a gas circulator and rather heavy.

Mr. Albert Curry, called as a witness by defendants, testified as follows:

I am a carpenter, living and working in Wichita for the past 14 years. I knew and worked with Reese Smith Stewart, Senior. I became acquainted and began working for him in July, 1930. He called me to do some work at his home. The work consisted of tearing out the walls, changing the floor and putting in doors and windows. Mr. Stewart assisted me in doing this work the same as any helper would. We would tear out the walls and carry the debris out and bring in the materials that we needed. August 23, 1930, I worked with him at 309 North Hillside. We built two new garage doors which were exceedingly heavy, requiring double tracks on both sides. Mr. Stewart helped me build these doors and helped me hang them. December 10, 1930, we worked at 1931 South Topeka Avenue. On this [fol. 98] occasion we took down and rebuilt garage doors and put up a new track, Mr. Stewart working with me as before. March 1, 1931, he had a barn that had been converted into a garage at 534 New York Avenue. We built new doors and put up a new track and he did his part on that job the same as he had previously done. November 26, 1931, we tore down and rebuilt garage doors and put up a new track at 826 South Lawrence Avenue.

Mr. C. E. Wilson, called as a witness by defendants, testified as follows:

I operate a light truck, hauling trash, cleaning up places and such work. I got acquainted with Reese Smith Stewart, Senior, about March 1, 1931. On that occasion we hauled ashes and tin cans and trash away from his home property. He did his share of the work and helped load with a shovel and would help unload and dispose of the trash and if there was a box or some other thing to load, he dived right in and helped load it. In 1931 I worked with him in cleaning up places on South Hydraulic and North Hillside.

Mr. Emuson Navis, called as a witness by defendants, testified as follows:

I am a painter and knew Reese Smith Stewart, Senior, during his lifetime. October 17, 1929, he and I painted a house on Hydraulic Avenue. Mr. Stewart acted as a

helper, cleaned off the old paint and helped paint. Part of the time working on a stepladder. October 20, 1929, we put two coats of paint on a house on South Lawrence Avenue. Mr. Stewart helped clean off the paint with a steel brush. He cleaned off most of the lower part of the house, working at it about three days. In April, 1930, we worked together nearly two weeks painting a house on North Hillside. Mr. Stewart helped clean off paint and did a little trimming around. In 1930 there was another job on New York Avenue where he helped me about a week and on this job he built up and hung new screens. About June, 1931, they were painting outside on South Topeka Avenue and Mr. Stewart helped, and in the fall of 1931 we did some more work on his house on South Lawrence Avenue, when Mr. Stewart cleaned off all the paint, requiring about four [fol. 99] days work. He took a washing fluid and got down on his hands and knees and cleaned off all the varnish.

During all those times he worked with me his apparent condition of health was good. He was always all right, up and coming.

Dr. T. J. McComb, called as a witness by defendants, testified as follows:

I have previously testified in this case. Have been a medical examiner at Wichita for old line insurance companies for the past 25 years and am now medical examiner for seven companies. I know the custom and usage of old line insurance companies with regard to requirements for medical examiners in connection with applications for insurance and am familiar with their customs and usages in regard to acting on information contained in medical examinations, relative to illnesses or sicknesses, disclosed therein.

By Mr. Gott: I think we will admit that he is listed as the attending physician, and we did not call him.

Q. What will you say as to the listing of the illness of flu, with regard to general practice of communication with the attending physician?

A. If in this way it is reported that it is a mild case, no complications, probably I would not have any correspondence with the company.

Defendants rest.

Plaintiff rests.

STIPULATION AS TO STATEMENT OF EVIDENCE

It is hereby agreed and stipulated that the above and foregoing is all the material evidence introduced on the trial of said cause, and it is hereby stipulated that the above and foregoing statement of evidence is true and correct and may be approved by the Judge.

Yankey, Osborne & Sears, William Keith, Attorneys for Defendants and Appellants. Vermilion, Evans, Carey & Lilleston, Attorneys for Complainants.

[fol. 100] ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing narrative statement of the evidence is hereby allowed and approved, and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above-styled cause, as provided in paragraph (b) of Equity Rule 75.

Dated, Wichita, Kansas, March 4, 1935.

Richard J. Hopkins, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed March 21, 1935

It is stipulated between the parties hereto that the cases No. 713-N, American Life Insurance Company v. Reese Smith Stewart, Jr., et al., and No. 714-N, American Life Insurance Company v. Ora Inez Stewart, et al, are identical as to the issues involved, except that they involve different beneficiaries under exactly similar life insurance policies taken out at the same time upon the life of the same insured; that identical pleadings, motions, orders and other proceedings were used and followed in each case, except the names of the parties and that to incorporate such pleadings, motions, orders and proceedings in the Transcript of the Record in both cases would result in duplications in the record, causing needless expense.

It is Therefore Stipulated between the parties hereto that in the Transcript of the Record only one set of pleadings, motions, orders and other proceedings from one case need be incorporated in this consolidated transcript. It being stipulated that all questions involved in these appeals can be determined upon such a transcript.

It is Further Stipulated:

That Whereas the insurance policies involved in both of said cases in their entirety are not material to matters involved in this appeal, and as certain parts of the policies are in the record as part of the examination of the witnesses,

It is Agreed that in incorporating as part of the record Exhibit A, being insurance policies attached to the Bills of Complaint, that only pages one and three of one of such [fol. 101] policies need be printed, and that a copy of the application and answers to the medical examiner, attached to the policy, need not be printed as part of said policy, for the reason that they have been sufficiently incorporated in the condensed statement of the evidence as exhibits.

All of which is done to further condense the record, and to avoid duplication in accordance with Equity Rule 76.

It is further stipulated and agreed that this stipulation shall be included in the transcript.

Dated this 21st day of March, 1935.

William Keith, Yankey, Osborne & Sears, Attorneys for Defendants. Henry V. Gott, Vermilion, Evans, Carey & Lilleston, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT OF RECORD—Filed March 21, 1935

To the Clerk of the Above Court:

You are hereby requested to make a consolidated transcript of record to be filed in the United States Circuit Court of Appeals for the Tenth Circuit pursuant to appeals allowed in the above-entitled causes, and to include in such transcript of record copies of the following, less formal parts, and no other papers and exhibits:

In the case of The American Life Insurance Company, a corporation, vs. Reese Smith Stewart, Junior, a minor, et al, No. 713-N the following:

1. Subpœna in equity and return thereon.
2. Bill of Complaint.
3. Motion of defendants to dismiss Bill of Complaint.
4. Supplemental Bill of Complaint.
5. Order submitting motion to dismiss and deferring consideration of the matter of injunctive relief.

[fol. 102] 6. Order overruling defendants' motion to dismiss.

7. Amended answer of defendants.
8. Petition for appeal.
9. Assignment of errors.
10. Citation of Appeal.
11. Appeal bond.

In the case of The American Life Insurance Company, a corporation, v. Ora Inez Stewart, et al, No. 714-N, the following:

1. Subpœna in equity and return thereon.
2. Stipulation as to Transcript of Record.
3. Petition for appeal.
4. Assignments of Error.
5. Citation of appeal.
6. Appeal bond.

In consolidated cases, No. 713-N and No. 714-N, the following:

1. Order consolidating for the purpose of trial equity causes numbered 713-N and 714-N.
2. Defendants' further and better statement.
3. Defendants' request for findings of fact Nos. 6, 7, 9, 10, 11, 12, 17, 19 and 20.
4. Findings of fact and conclusions of law and defendants' exceptions thereto.
5. Order on reversed ruling as to admissibility of evidence.
6. Decree.
7. Statement of evidence under Equity Rule 75(b).
8. This precipe and service thereon.

The said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Tenth Circuit, and to be filed in the office of the clerk of the Circuit Court of Appeals at Denver, Colorado, on or before [April 1st,]* March 24, 1935.

William Keith, Yankey, Osborne & Sears, Attorneys for Defendants and Appellants.

[fol. 103] Service of the above precipe accepted and acknowledged this 21st day of March, A. D. 1935.

Henry V. Gott, Vermilion, Evans, Carey & Lilleston, Attorneys for Complainants and Appellees.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE OF APPELLEES DESIGNATING ADDITIONAL PARTS OF THE RECORD TO BE INCORPORATED INTO THE TRANSCRIPT—Filed March 22, 1935

To the Clerk of the Above Court:

You are hereby requested to include in the Transcript of Record to be filed in the United States Circuit Court of Appeals for the Tenth Circuit, in addition to the papers and documents called for by appellants' præcipe, the following:

A. In the case of The American Life Insurance Company, a corporation, v. Reese Smith Stewart, Junior, et al., No. 713-N, the following, less formal parts:

1. Motion for leave to file supplemental bill of complaint, filed October 27, 1932.

2. Order permitting the filing of supplemental bill of complaint, filed October 29, 1932.

3. Notice of application for restraining order and injunctive relief and acknowledgment of service thereof, filed March 3, 1933.

4. Consent to amend original bill of complaint, filed July 31, 1933.

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* [Matter in brackets, struck out in copy.]

5. Stipulation to try Equity Case Number 713-N prior to law action on same policy, filed August 29, 1933.

6. Order approving stipulation and authorizing trial of equity action prior to law action, filed August 31, 1933.

7. Plaintiff's motion for further and better statement, filed October 10, 1933.

B. After the consolidation of Cases Number 713-N and Number 714-N, for purposes of trial, the following, less formal parts:

[fol. 104] 1. Order of submission of said consolidated causes, filed January 9, 1934.

2. This præcipe and service thereon.

Dated at Wichita, Kansas, this 22nd day of March, 1935.

Vermilion, Evans, Carey & Lilleston, Henry V. Gott, Solicitors for Appellee, The American Life Insurance Company.

Service of the above præcipe accepted and acknowledged this 22nd day of March A. D. 1935.

William Keith, Yankey, Osborne & Sears, Solicitors for Appellants.

[File endorsement omitted.]

[Citations in proper form, dated Feb. 12, 1935, directed to appellee, with acceptances of service by counsel for said appellee, were filed in the District Court on Feb. 14, 1935.]

IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME—Filed March 23, 1935

Now on this 21st day of March, 1935, came the defendants and appellants in the above-entitled actions by their attorneys of record, William Keith and Yankey, Osborne & Sears, and moved the court for an order of enlargement of the time, and before its expiration, for docketing the case and filing the record thereof with the clerk of the United States Circuit Court of Appeals, and good and sufficient cause having been shown,

It Is Therefore Ordered That the time for docketing the case and filing the record thereof with the clerk of the United States Circuit Court of Appeals be and the same is hereby enlarged and extended for a period of Thirty days from and after the return date of the Citation of Appeal, to-wit: from and after the 24th day of March, 1935.

Richard J. Hopkins, Judge.

Okeh: Henry V. Gott, Vermilion, Evans, Carey & Lille-
[fols. 105-106] ston, Attorneys for Plaintiff and Appellee. William Keith, Yankey, Osborne & Sears, Attorneys for Defendants and Appellants.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] In United States Circuit Court of Appeals, Tenth Circuit

Order of Submission, No. 1268—September 23, 1935

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges

This cause came on to be heard and was argued by counsel, Charles G. Yankey, Esquire, appearing for appellants, Henry V. Gott, Esquire, appearing for appellee.

On motion, appellee was granted leave to file three typewritten copies of a memorandum brief in this cause instanter, which was accordingly done.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals

Order of Submission, No. 1269—September 23, 1935

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges

This cause came on to be heard and was argued by counsel, Charles G. Yankey, Esquire, appearing for appellants, Henry V. Gott, Esquire, appearing for appellee.

On motion, appellee was granted leave to file three typewritten copies of a memorandum brief in this cause instanter, which was accordingly done.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SEPTEMBER TERM, 1935

Nos. 1268 and 1269

OPINION—December 16, 1935

Chas. G. Yankey (William Keith, Harvey C. Osborne, John G. Sears, Jr., Verne M. Laing were with him on the brief) for appellants.

[fol. 108] Henry V. Gott (Jos. G. Carey and Vermilion, Evans, Carey & Lilleston were with him on the brief) for appellee.

Before Lewis, Phillips, and Bratton, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court:

On February 23, 1932, the American Life Insurance Company issued two policies of insurance on the life of Reese Smith Stewart. Each contains the following incontestable clauses:

"This policy shall be incontestable, except for non-payment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue * * *."

Stewart died May 31, 1932. On September 3, 1932, the Insurance Company brought these suits in equity to cancel the policies on the ground of alleged fraudulent statements in the application therefor. On October 11, 1932, Reese Smith Stewart, Jr., and Ora Inez Stewart, the beneficiaries under the policies, brought actions at law thereon. On October 27, 1932, the Insurance Company filed supplemental bills in which they set up the pendency of the actions at law and prayed that the prosecution of the same be enjoined.

The defendants to the equity suits filed motions to dismiss the bills on the ground that the Insurance Company

had an adequate remedy at law. On July 28, 1933, the court overruled the motions to dismiss, and the defendants duly excepted.

Thereupon the parties stipulated that the suits in equity should be tried in advance of the actions at law.

The bills alleged that the Insurance Company was without an adequate remedy at law in the premises. The defendants in their answers denied that allegation, and denied that the Insurance Company was entitled to any relief in equity.

The equitable actions were consolidated. From a decree cancelling the policies the defendants have appealed.

Stewart having died within a year from the date of issue of the policies, the incontestable period did not expire until February 23, 1934. The suits in equity were filed one year, five months, and twenty days prior to the expiration of the [fol. 109] incontestable period. There was then no danger of the defense of fraud being lost by reason of the expiration of such period.

In Di Giovanni v. Camden Fire Ins. Assn., —— U. S. ——, (decided November 11, 1935) the court said:

"This court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss has occurred and a suit at law to recover the amount of the loss is pending or threatened. Enelow v. New York Life Insurance Co., 293 U. S. 379. The alleged fraud of petitioners, as well as their alleged destruction of the property insured are defenses available in suits at law upon the policies. While equity may afford relief quia timet by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced, no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent, and there is no showing that the defenses cannot be set up and litigated as readily in a suit at law as in equity. See Enelow v. New York Life Insurance Co., Supra, 384, 385."

Here the actions at law were imminent when the original bills were filed and pending when the supplemental bills were filed. Neither the original bills nor the supplemental bills set up facts showing that the defense of fraud could

not be set up and litigated as readily in an action at law as in a suit in equity. It follows that the Insurance Company had an adequate remedy at law.

Counsel for the Insurance Company assert that the defendants, by answering over and entering into the stipulation, waived the want of jurisdiction in equity.

Where the court has jurisdiction of the subject matter and the parties are before it, and the case is within the field of equitable jurisdiction, the objection that plaintiff has an adequate remedy at law may be waived by the defendant. Lyons Milling Co. v. Goffe & Carkener, (C. C. A. 10), 46 F. (2d) 241, 245.

But here the defendants challenged the equity jurisdiction both by the motions to dismiss and by the denials above adverted to in their answers.

[fol. 110] Where, as here, the case is not one which could properly be transferred to the law docket, the objection that plaintiff has an adequate remedy at law may be raised by motion to dismiss, or by the answer. Eq. Rule 29; Kaufman v. Wiener, 48 N. E. 479, 169 Ill. 596.

Where the plaintiff alleges that he has no adequate remedy at law a denial of that fact in the answer properly raises the objection.[1]

Answering over after the denial of a motion to dismiss for want of equity, where the answer also challenges the equitable jurisdiction, does not constitute a waiver of the want of equitable jurisdiction. Kaufman v. Wiener, supra. Nor do we think the defendants waived the objection by stipulating the equitable suits should be tried in advance of the actions at law after they had unsuccessfully challenged the equitable jurisdiction by proper motions to dismiss. When the court ruled adversely the only course open to them was to renew the objection in their answers and proceed to trial.

The decree is reversed and the cause remanded with instructions to dismiss the bills without prejudice to setting up the alleged fraud as a legal defense to the actions at law.

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[1] Clements v. Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. Supp. 766, id. 79 N. E. 1102; Butler v. Wright, 103 App. Div. 463, 93 N. Y. Supp. 113, 119 (reversed on other grounds, 78 N. E. 1002); Erste Sokolower Congregation v. First United R. Sokolower Verein, 32 Misc. Rep. 269, 66 N. Y. Supp. 356, 357.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE, No. 1268—December 16, 1935

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said District Court with instructions to dismiss the bill of complaint herein without prejudice to set- [fol. 111] ting up the alleged fraud as a legal defense to the action at law; and that Reese Smith Stewart, Jr., and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, deceased, appellants, have and recover of and from The American Life Insurance Company, a corporation, appellee, their costs herein and have execution therefor as at law.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE, No. 1269—December 16, 1935

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said District Court with instructions to dismiss the bill of complaint herein without prejudice to setting up the alleged fraud as a legal defense to the action at law; and that Ora Inez Stewart and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, deceased, ap-

pellants, have and recover of and from The American Life Insurance Company, a corporation, appellee, their costs herein and have execution therefor as at law.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed January 13, 1936

Comes now The American Life Insurance Company, the appellee in the above-entitled cause, and moves the court to grant it a rehearing herein, and in support hereof shows that the decision of the court is erroneous in each of the following respects and for each of the following reasons:

I

The court erred in holding that the appellee had an adequate remedy at law and that the bills of complaint should be dismisssed.

[fol. 112] The above ruling of the court appears to have been based upon the case of Di Giovanni v. Camden Fire Ins. Assn., — U. S. —, 56 Sup. Ct. Rep. 1, decided by the Supreme Court on November 11, 1935. Appellee contends that that case is inapplicable to the cases at bar, both as to law and fact. The subject of the Di Giovanni case was fire insurance and in that case there was no incontestable clause involved. Furthermore, in that case the bill of complaint expressly alleged that the defendant had threatened to and was about to begin suits at law to recover on the policies. The bills in the cases at bar set out the usual two-year incontestable clause and allege appellee's reasons for the fear that the appellants might delay the commencement of the actions at law on the policies until after the expiration of the contestable period, and that if actions at law were instituted the same might be dismissed after the expiration of said contestable period and because thereof the appellee would not have an adequate remedy at law. Under the Kansas code successive actions at law could be brought and dismissed and after the contestable period had elapsed, the same action could be reinstated. The appellee's legal remedy unquestionably depended upon the whim of its adversaries. Actions at law in the state court might have finally been brought during the last days of contestability

and before removal to the Federal Court the contestable period would have gone by.

The Di Giovanni case was bottomed on the case of Enelow v. New York Life Ins. Co., 293 U. S. 379, which is distinguished from the cases at bar because in that case, while there was an incontestable clause involved, actions as law had in fact been commenced to recover on the policies before the bills in equity were filed. In the cases at bar no law actions had been begun when the bills in equity were filed and, as we shall see, equity jurisdiction must be determined as of the time the equity suits were filed and not in the light of the subsequent action of adversaries. While the facts in the Enelow case were different from those in the cases at bar and the decision was against the insurer, nevertheless in the course of the opinion the Chief Justice announced an exception to the rule therein expressed which definitely applies to cases in which the facts are the same as here involved, viz., where the bills have been filed after death has occurred and an action at law has not been brought on the policy and equitable relief is sought to protect the insurer against the loss of its defense by the expira-[fol. 113] tion of the contestable period. In support of that exception the Supreme Court cited a formidable line of authoritative decisions identical with the cases at bar, thereby clearly approving the procedure that was followed in these cases.

II

The court erred in holding that the adequacy of appellee's legal remedy was placed in issue by appellants' answer.

The court in effect held that appellants sufficiently raised the issue of appellee's inadequacy of a legal remedy by a general denial in their answer of the allegation of that fact in the bills. Appellee respectfully contends that the answer containing nothing more than a general denial as respects the allegations of inadequacy of legal remedy, and as such was insufficient to raise any issue on that question under Equity Rule 30. Moreover, the written stipulation (hereinafter more definitely described) entered into by the appellants to try the equity actions ahead of the law actions, before the amended answer was filed, conclusively disclosed the intention of appellants to waive a jury and abandon any objection they might have had to equitable jurisdiction.

Indeed had their answer raised such objection, it would have been wholly inconsistent with the stipulation, and litigants should not be permitted to trifle with over-burdened courts in that fashion.

III

The court erred in holding that the appellants by entering into a written stipulation to try the equity cases ahead of the law actions did not waive want of equitable jurisdiction.

After appellants' motions to dismiss the bills were overruled and while appellee's application for an order restraining further proceedings in the law actions until the equity actions were tried, was pending, appellants in effect consented to that stay by entering into a written stipulation whereby, with the approval of the court, they agreed that the equity actions should be tried to the court before the trial of the law actions and that the issues in the law actions should be made up so that if any law issues remained for trial after the trial of the equity actions, the law actions would then be tried (R. 20). The stipulation, after reciting the overruling of the motions to dismiss the bills, the filing of the law actions and the pendency of the [fol. 114] motion to stay proceedings in the law actions, then set forth the reason for and purpose of the stipulation, in words as follows:

"Now, Therefore, *in order to expedite the decision of the matters in controversy, the parties hereto, subject to the approval of the court, stipulate and agree:* * * *" (R. 21.) (Italics ours.)

The alleged adequacy of legal remedy, if it had existed (in this type of case), would only have given appellants the personal privilege of insisting upon it; in other words; they could not have been compelled to try the litigation before the chancellor unless they consented to it, and they said in writing, in effect, "We consent."

If appellants had not intended to abandon their objection that there was want of equitable jurisdiction, they should have required appellee to press its application for a restraining order to a ruling by the court, and if the ruling had been adverse to them thereon they could have taken an appeal from that interlocutory order to this court, which

is exactly what was done in the Enelow case. This court could then have passed upon the very question that it did pass upon in these cases, and the litigants would have been spared the enormous expense, time and trouble of a trial definitely invited and induced by a solemn stipulation and consent in writing.

The three foregoing subjects of the desired rehearing are hereafter briefed in the foregoing order.

Wherefore, appellee prays that for the foregoing reasons it be granted a rehearing herein and that on said rehearing this court's previous decision be set aside and held for naught and the decree made and entered in these causes by the trial court, be affirmed.

Jos. G. Carey, Henry V. Gott, of Wichita, Kansas, Attorneys for Appellee. Vermilion, Evans, Carey [fol. 115] & Lilleston, of Wichita, Kansas, of counsel.

Certificate

I, Jos G. Carey, hereby certify that I am one of the attorneys for the appellee, The American Life Insurance Company, in the foregoing cases and court; that in my opinion the foregoing petition for rehearing is well founded, and I further certify that it is presented in good faith and not made for the purpose of delay.

Jos. G. Carey.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Orders of Submission on Petition for Rehearing—June 4, 1936

No. 1268

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges

This cause came on to be heard on appellee's petition for a rehearing herein and was argued by counsel, Charles G. Yankey, Esquire, appearing for appellants, Henry V. Gott, Esquire, appearing for appellee, William C. Michaels, Es-

quire, appearing for The Prudential Insurance Company of America, amicus curiae, James C. Jones, Jr., Esquire, and Robert Stone, Esquire, appearing for New York Life Insurance Company and Central States Life Insurance Company, amici curiae.

Thereupon this cause was submitted to the court.

No. 1269

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges

This cause came on to be heard on appellee's petition for a rehearing herein and was argued by counsel, Charles G. Yankey, Esquire, appearing for appellants, Henry V. Gott, Esquire, appearing for appellee, William C. Michaels, Esquire, appearing for The Prudential Insurance Company [fol. 116] of America, amicus curiae, James C. Jones, Jr., Esquire, and Robert Stone, Esquire, appearing for New York Life Insurance Company and Central States Insurance Company, amici curiae.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals

Nos. 1268 and 1269—April Term, 1936

Opinion on Petition for Rehearing—September 8, 1936

Chas. G. Yankey (William Keith, Harvey C. Osborne, John G. Sears, Jr., Verne M. Laing were with him on the brief) for appellants.

Henry V. Gott (Jos. G. Carey and Vermilion, Evans, Carey and Lilleston were with him on the brief) for appellee.

William C. Michaels (Kenneth E. Midgley, Alfred Hurrell, Ralph W. Hyatt, and Meservey, Michaels, Blackmar, Newkirk & Eager were with him on the brief) for The Prudential Insurance Company of America, amicus curiae.

Robert Stone and James C. Jones (James C. Jones, Jr., was with them on the brief) for New York Life Insurance Company and Central States Life Insurance Company, amici curiae.

C. B. Robbins, Ralph H. Kastner and Maurice E. Benson filed a brief for the American Life Convention, amicus curiae.

Before Lewis, Phillips and Bratton, Circuit Judges.

Lewis, Circuit Judge, delivered the opinion of the court.

We reversed the decrees entered in favor of appellee in the causes above-entitled for the reasons stated in our opinion in 80 F. (2d) 600. Thereupon appellee applied for rehearings. Other insurance companies asked to intervene in that application as friends of the court, and permission was granted. Through their counsel they, as well as counsel for appellee, have filed briefs, and claimed errors in our reversal have been elaborately argued. The whole controversy is whether appellee had a plain, adequate, and complete remedy at law and was thereby precluded from proceeding in equity, as the trial judge permitted it to do. [fol. 117] The point argued arose out of these facts and circumstances: On February 23, 1932, appellee, a Colorado corporation, issued to Reese Smith Stewart, a resident and citizen of Wichita, Kansas, two policies of life insurance. In one of them his wife, Ora Inez Stewart, and in the other his son, Reese Smith Stewart, Jr, was named as beneficiary. The insured paid the first annual premiums, but died on May 31, 1932, before any additional premium was due. Each policy contained this provision:

"This policy shall be incontestable, except for nonpayment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue; * * *."

On September 3, 1932, which was six months and twenty days after the policies were issued, appellee filed a bill in equity against each beneficiary. It is to be observed that approximately a year and a half remained after the bills were exhibited before the two years, during which appellee had a right to contest the validity of the policies, would expire. The only reason set forth in the bill for filing it at the time it was filed is stated thus:

"That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the inter-

vening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity."

The fraud on which the bills sought cancellation consisted of alleged false statements by the insured in his application [fol. 118] for insurance as to the state of his health at the time of application and for several years previous thereto, and the medical attention and service that he had theretofore had because of the condition of his health. On September 26, 1932, each appellant moved to dismiss the bill. One of the grounds stated was that the bills did not state facts sufficient to constitute a valid cause of action in equity. No action was taken on those motions until July 28, 1933, when they were overruled. While they were pending and on October 27, 1932, appellee filed supplemental bills in which it was alleged that appellants on October 11, 1932, had instituted in the court below in which the bills were pending actions at law to recover the amounts named in the policies, and that if appellants were not enjoined and restrained they would prosecute these legal actions to determination prior to obtaining decrees in equity on the two bills, and it was prayed that they be restrained from doing so. On August 29, 1933, counsel for the respective parties submitted to the court a stipulation. It recited the dates of the filing of the bills, September 3, 1932; the date of instituting the two actions at law, October 11, 1932; the pendency of appellee's motions to restrain the prosecution of the law actions until the equity suits could be tried; and the agreement of the parties that the suit in equity should be tried before the law actions were tried.

"Provided, However, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the

understanding that said law issues, if any remain for trial shall be tried as soon after the trial of the suit in equity as the court shall determine.

"It is further agreed by the parties hereto that if this stipulation meets with the approval of the court, that a stipulation and agreement to the same effect shall be entered in said law action.

"It is further agreed that if this stipulation does not receive the approval of the court, that then and in that event Complainant's application for an order restraining and enjoining further proceedings in said law action shall be presented to the court as soon as it will hear the same."

[fol. 119] Defendants answered the bills on October 10, 1933. After admissions and denials, they denied that complainant was entitled to the relief demanded in the bills. The two equity causes were consolidated for trial, and early in January, 1934, they went to final hearing followed by decree on December 7, 1934, which cancelled the policies and ordered that they be delivered to the clerk of the court for surrender to plaintiff.

Fraudulent representations and willful concealment of the truth in transactions with another that do or will result in damage to him are actionable and relief is within the concurrent jurisdiction of law and equity, except where restricted by controlling authority to one or the other court. Without such restrictions it would seem to be orderly procedure to permit the court which first obtains jurisdiction of the controversy to adjudicate all the rights of the parties. There are two correlated provisions on the subject—one constitutional, the other statutory. The Seventh Amendment to the Constitution of the United States provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The sixteenth section of the original Judiciary Act (1 Stat. 82), which has been continuously retained in all material respects though with slight changes of phraseology, is now section 384, 28 U. S. C. A.:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

These provisions have seemed so important to the rights of the citizen and orderly procedure in the two jurisdictions that they have been enforced by the Federal Courts of their own motion even when not asserted and claimed by a litigant. Indian Land & Trust Co. v. Shoenfelt, 135 Fed. 484; Hipp v. Babin, 19 How. 271; Cappetta v. Atlantic Refining Co., 74 F. (2d) 53; Insurance Co. v. Bailey, 13 Wall. 616; Cable v. Insurance Co., 191 U. S. 288. The [fol. 120] opinion of the court in the Cable case reannounces the principles declared in the Bailey case. These differences in fact, however, appear in those cases. In the Bailey case, as in the case now under consideration, the bill in equity was filed first, and thereafter the beneficiary instituted her law action in the same court. In the Cable case the law action was instituted in a state court about one and a half hours prior to the filing of the equity suit by the insurance company in the Federal Court. In the Bailey case and in the case now under consideration no special circumstances were set up to support and that would support equitable jurisdiction. In the case now under consideration it was alleged that during the one and a half years remaining in which the insurer might contest the validity of the policies the beneficiaries might not institute actions at law so that it could plead thereto the fraud alleged in the bill, or if the beneficiaries should bring such suits they might dismiss them at the end of the contestable period, and in that way defeat appellee's defense of fraud. Those are not allegations of fact. They are mere surmises. It did not allege that the beneficiaries had declared their intentions of doing what the bills alleged they might do. No other special circumstances appear in the bills as basis for the exercise of a Chancellor's powers. In the Cable case special cicumstances were alleged in the bill as grounds for equitable intervention, but the Supreme Court held them insufficient for that purpose. When the Cable and Bailey decisions are attentively read and carefully considered, followed by the Di Giovanni case, 296 U. S. 64, and Enelow v. Insurance Co., 293 U. S. 379, to

which we referred in our prior opinion, it is more than difficult to find error in our judgment of reversal. When appellee filed its bills it was in no present danger of losing its right to defend in law actions, if they should be brought by the beneficiaries on the policies. Approximately a year and a half remained for that procedure. Actions were brought on the policies by the beneficiaries thirty-eight days after the bills were filed and before issues were made up in the equity suit. It can not be maintained that from the time those actions were instituted the appellee did not have a plain, adequate, and complete remedy at law for the grievances set up in its bills by answering in the law actions. Adamos v. Life Ins. Co., 293 U. S. 386. The statute prohibits the sustaining of a suit in equity under those conditions. The relation of the parties to each other at that time was precisely as it was in the Bailey case. The [fol. 121] Circuit Court dismissed the bill without prejudice. The Supreme Court approved and affirmed, because the insurer could have all its rights adjudicated by answer to the action at law, instituted after the bill was exhibited to the Chancellor and his protection sought, and the beneficiaries would not be denied the right of trial by jury. Here the law actions were instituted within a reasonable time (four months and eleven days) after the loss occurred. If the beneficiary sues on the policy so that insurer has reasonable time thereafter within the two years to prepare and file its answer attacking the validity of the policy; that is enough to require the court to adjudicate the whole controversy in the law action, in the absence of other equitable grounds to support insurer's previous resort to equity. Our order was like that in the Bailey case, that the bills be dismissed without prejudice. If occasion should arise disclosing an equitable right in appellee, the court could give protection.

It is insisted that the stipulation of counsel that the equity suit be heard first and that the law actions be continued until that could be done should be binding on applellants. The stipulation was not exclusively an agreement between the parties. It provided that its terms should meet the approval of the court, and if it did not receive the court's approval that then and in that event complainant's application for an order restraining and enjoining further proceedings in the law actions would be presented to the

court. The stipulation did not relieve the court of its duty, discussed in the authorities above cited, of complying with the express requirements of the statute, that no court of the United States shall sustain a suit in equity where a plain, adequate, and complete remedy may be had at law, nor deny a jury trial of a law action unless both parties expressly waive it. Acting contrary to this duty the court in this case approved the stipulation when it should have been denied.

It seems unnecessary to review the many cases cited in the briefs, because of differences in facts. In some of them grounds for equitable relief were set up in the bills aside from and in addition to the facts that constituted a basis for decree. In others no such bases for equitable relief were pleaded, and those bills were bad in our judgment.

We hold (1) that the bill did not show equity, and the motion to dismiss should have been sustained; (2) that ap-[fol. 122] pellee had opportunity from and after October 11, 1932, until February 23, 1934, to file answers to the actions on the policies and thus avail itself of its plain, adequate, and complete remedy at law for redress of the grievances set up in the bills; and because thereof this court did not err in its reversal of the decrees in said suits in equity.

DISSENTING OPINION

PHILLIPS, Circuit Judge, dissenting:

Stewart, the insured, died May 31, 1932. Thereafter, the Insurance Company notified the beneficiaries that it elected to cancel the policies on the ground of fraud and tendered them the amount of the premiums paid, with interest. After waiting a reasonable time for the beneficiaries to bring actions at law on the policies, it filed its bills in equity on September 3, 1932, for cancellation of the policies.

Paragraph eight of each bill read as follows:

"8. That the said policy contains a clause in words and figures as follows, to-wit:

'Incontestability: This policy shall be incontestable, except for non-payment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue, except as to provi-

sions and conditions (if any) relating to benefits in event of total and permanent disability and those granting additional insurance against death by accident.'

"That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period * * *, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law [fol. 123] in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity."

Paragraphs eight and ten of each answer read as follows:

"8. Defendants admit that the policy issued and delivered to the said Reese Smith Stewart, as aforestated, contained an 'Incontestability Clause' as set forth in paragraph numbered eight (8) in complainant's bill of complaint herein, but defendants deny any knowledge or information sufficient to form a belief as to any of the other allegations contained in said paragraph eight (8)."

"10. Defendants deny each and every allegation in the bill not herein admitted, controverted or specifically denied."

I

Whether the trial court had jurisdiction in equity must be determined by the facts and circumstances existing when the bills were filed. Lincoln National Life Ins. Co. v. Hammer (C. C. A. 8) 41 F. (2d) 12, 17. If jurisdiction in equity then existed, it was not lost because an adequate remedy at law thereafter became available.[1]

[1] Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 296; Insurance Co. v. Hammer, supra; Brown v. Pacific Mutual Life Ins. Co. (C. C. A. 4) 62 F. (2d) 711; Jefferson Standard Life Ins. Co. v. Keeton (C. C. A. 4) 292 F. 53, 56.

At the time the bills in equity were filed, no actions at law had been brought on the policies. Since the contestable period was much shorter than the period fixed by the Kansas statute of limitations for bringing actions on the policies,[2] it was then within the power of the beneficiaries to postpone the commencement of actions at law on the policies until the expiration of the contestable period.

Where the insured under a policy of life insurance has died, and the obligation to pay a stated sum has become certain, a suit to cancel the policy on the ground of fraud will not lie in the absence of special circumstances making the preventive remedy necessary to avoid irreparable injury. Ordinarily the right to interpose the fraud as a defense affords an adequate remedy. Insurance Company vs. Bailey, 13 Wall. 616. In that case the facts were these: [fol. 124] The insured in two policies of life insurance had died, notice thereof had been given and the required proof furnished to the Insurance Company. The beneficiary's claims were purely legal demands. The Insurance Company refused payment on the ground the policies were obtained by false misrepresentations and fraudulent suppression of material facts, and instituted a suit in equity to enjoin the beneficiary from transferring the policies and for the cancellation thereof. Thereafter an action at law was commenced on the policies. The court said:

"Where a party, if his theory of the controversy is correct, has a good defence at law to 'a purely legal demand,' he should be left to that means of defence, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending * * *.

"Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause

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[2] The period of limitation for action on contract in writing in Kansas is five years. Kans. R. S. 1923, § 60-306.

of action is 'a purely legal demand,' and nothing appears to show that the defence at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal Court, * * *"

Subsequently to the decision in Insurance Company vs. Bailey, supra, it became common practice to incorporate in life insurance policies incontestable clauses under which, after the expiration of a stated time, the insurer is barred from contesting liability on the policy except for non-payment of premiums.

While the earlier decisions were in conflict,[3] it is now generally held that a mere repudiation by the insurer is not sufficient; and that there must be a contest by judicial proceeding within the time specified, either by way of an affirm- [fol. 125] ative suit brought by the insurer or by a defense asserted by the insurer in an action on the policy.[4]

In Lincoln National Life vs. Hammer (C. C. A. 8) 41 F. (2d) 12, the court said:

"It is established by the great weight of authority, * * * that the contest * * * must be initiated by an appropriate action brought, or by a pleading filed in a suit pending, within the time limited * * *."

Where a policy of life insurance contains an incontestable clause, although the insured has died and the obligation of the policy to pay a stated sum of money has become certain, if the beneficiary may delay bringing an action on

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[3] New York Life Ins. Co. v. Hurt (C. C. A. 8) 35 F. (2d) 92, 95.

[4] New York Life Ins. Co. v. Hurt (C. C. A. 8) 35 F. (2d) 92, 95; New York Life Ins. Co. v. Truesdale (C. C. A. 4) 79 F. (2d) 481, 485; Densby v. Acacia Mutual Life Assn. (D. C. App.) 78 F. (2d) 203, 205; Rose v. Mutual Life Ins. Co. (C. C. A. 6) 19 F. (2d) 280, 282; Philadelphia Life Ins. Co. v. Burgess (D. C. S. C.) 18 F. (2d) 599, 603; Peake v. Lincoln Nat. Life Ins. Co. (C. C. A. 8) 15 F. (2d) 303, 306; Chun Ngit Ngan v. Prudential Ins. Co. (C. C. A. 9) 9 F. (2d) 340, 341; Scharlach v. Pacific Mutual Life Ins. Co. (C. C. A. 5) 9 F. (2d) 317, 318; Harnischfeger Sales Corp. v. National Life Ins. Co. (C. C. A. 7) 72 F. (2d) 921, 922.

the policy until after the expiration of the contestable period, and the beneficiary fails to commence an action on the policy within a reasonable time after the obligation to pay has arisen, it has been held in a long line of federal and state decisions, that the requisite special circumstances exist to give a court jurisdiction of a suit in equity for cancellation on the ground of fraud.[5] The remedy at law in such a case is subject to the will of the beneficiary who [fol. 126] may give it by bringing an action on the policy or withhold it by delaying the bringing of such action until

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[5]Jefferson Standard Life Ins. Co. v. Keeton (C. C. A. 4) 292 F. 53, 54-55; New York Life Ins. Co. v. Seymour (C. C. A. 6) 45 F. (2d) 47, 48; Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A. 5) 294 F. 886; Jones v. Reliance Life Insurance Co. (C. C. A. 4) 11 F. (2d) 69; Peake v. Lincoln Nat. Life Ins. Co. (C. C. A. 8) 15 F. (2d) 303, 305; Harnischfeger Sales Corporation v. National Life Ins. Co. (C. C. A. 7) 72 F. (2d) 921, 923; Brown v. Pacific Mutual Life Ins. Co. (C. C. A. 4) 62 F. (2d) 711, 712; New York Life Ins. Co. v. Truesdale (C. C. A. 4) 79 F. (2d) 481, 485; Keystone Dairy Co. v. New York Life Ins. Co. (C. C. A. 3) 19 F. (2d) 68; New York Life Ins. Co. v. McCarthy (C. C. A. 5) 22 F. (2d) 241, 245; Shaner v. West Coast Life Ins. Co. (C. C. A. 10) 73 F. (2d) 681, 683; New York Life Ins. Co. v. Cobb, 282 S. W. 494, 495-497, — Mo. App. ——; Aetna Life Ins. Co. v. Daniel, 42 S. W. (2d) 584, 586, 587, — Mo. —; New York Life Insurance Company v. Steinman, 143 Atl. 529, 103 N. J. Eq. 403; Ebner v. Ohio State Life Ins. Co., 121 N. E. 315, 321; Travelers' Ins. Co. v. Snydecker, 215 N. Y. S. 276; Prudential Ins. Co. of America v. Tannenbaum, 167 Atl. 147, — R. I. —; N. Y. Life Ins. Co. v. Rigas, 168 Atl. 22, — Conn. —. See also American Trust Co. v. Life Ins. Co. of Virginia, 92 S. E. 706, 173 N. C. 558; Pacific Mut. Life Ins. Co. v. Parker (C. C. A. 4) 71 F. (2d) 872, 874; Massachusetts Bonding & Ins. Co. v. Anderegg (C. C. A. 9) 83 F. (2d) 622; Rose v. Mutual Life Ins. Co. of New York (C. C. A. 6) 19 F. (2d) 280; Note 73 A. L. R. 1529.

In New York Life Insurance Company v. Seymour (C. C. A. 6) 45 F. (2d) 47, the Insurance Company, after the death of the insured, brought a suit to cancel the policy on the ground of fraud; thereafter, the beneficiary brought

the contestable period has expired, and thereby deprive the insurer of the defense of fraud. A remedy at law is inadequate, if it may be given or withheld at the will of the opposing party.[6]

Has the doctrine of the cases cited in note five been disapproved or limited by the recent decisions of the Supreme Court referred to infra?

In Enelow vs. New York Life Insurance Company, 293 U. S. 379 and Adamos vs. New York Life Ins. Co., 293 U. S. 386, the beneficiaries had brought actions at law on the policies and the Insurance Company sought to interpose in the pending actions at law equitable counter-claims for cancellation on the ground of fraud. That the Supreme Court did not intend to disapprove the doctrine of the cases cited in note five, is clearly shown by the following quotation from the opinion in the Enelow case:

"The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. *Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period*

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an action on the policy in the state court which was removed to the Federal Court.

In sustaining the jurisdiction in equity the court said:

"The policy involved in the Bailey Case did not have the incontestable clause; and, however long the beneficiary delayed the suit at law, the assured's fraud in the application continued to be a good defense, which, if shown, would defeat the action. Manifestly, with the incontestable clause, the situation is different; the beneficiary has only to wait until the specified time expries; and, to the suit then brought, the defense is not available. This presents a situation within the exception of the Bailey Case, and gives equity the right to take hold. * * *"

[6] Bank of Kentucky v. Stone (C. C. Ky.) 88 F. 383, 391; Lincoln National Life Ins. Co. v. Hammer (C. C. A. 8) 41 F. (2d) 12, 16; New York Life Ins. Co. v. Seymour (C. C. A. 6) 45 F. (2d) 47; New York Life Ins. Co. v. Sisson (D. C. Pa.) 19 F. (2d) 410, 412.

after which the policy by its terms is to become incontestable.[2] Here, on the death of the insured, an action at law was brought on the policy, and the defendant had oppor- [fol. 127] tunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant 'with knowledge of their falsity and fraudulently' in order to obtain the insurance. The affidavit of defense showed nothing whatever as a further ground for equitable relief and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity." (Italics mine.)

In note two to the Enelow opinion the court cites many of the cases cited in note five, supra.

Di Giovanni v. Camden Ins. Association, 296 U. S. 64, was a suit in equity to cancel two policies of fire insurance after losses had occurred. One policy for $3,000, was issued to De Giovanni and his wife and covered a two-story brick building owned by them jointly. One policy for $1,500 was issued to Di Giovanni and covered personal property solely owned by him. The bill charged that pursuant to a conspiracy, the Di Giovannies overinsured the property and caused its destruction by fire. Two grounds for equitable jurisdiction were set up, the want of a remedy at law in the Federal Courts, neither claim being in excess of $3,000, and the necessity of defending separately, two groundless actions at law. The bill alleged that the Di Giovannies threatened and were about to bring actions at law on the policies. Thus it will be seen that no incontestable clause was involved and the grounds of equitable jurisdiction were entirely different from those relied on by the Insurance Company in the instant cases. It is true the Supreme Court used language in the opinion which, if literally construed, would limit the doctrine of the cases cited in note five. However, language of an opinion should be read in the light of the facts and circumstances of the particular

case under consideration;[7] and in view of the fact that the [fol. 128] court, in the Enelow opinion had so recently, tacitly approved the cases cited in note five, the general language in Di Giovanni v. Insurance Association should not be construed as disapproving or limiting the doctrine of such cases.

There are persuasive reasons why an insurer should not be compelled to wait until the incontestable period is about to expire before bringing its suit in equity for cancellation. The beneficiary might absent himself from the jurisdiction or otherwise prevent service of process and thus frustrate an effort to initiate a contest until after the contestable period had expired. See New York Life Ins. Co. v. Panagiotopoulos (C. C. A. 1) 80 F. (2d) 136. It is my view that the insurer should only be required to wait a reasonable time for the beneficiary to bring an action at law on the policy, and if the beneficiary fails so to do, that the insurer should then have the right to seek equitable relief. In the instant cases, the Insurance Company waited a reasonable time and the beneficiaries failed to sue at law. I think the Insurance Company was entitled to invoke the equitable jurisdiction.

The views expressed in our original opinion did not have my entire approval. The arguments and briefs on the petition for rehearing have lead me to the conclusion that we should not depart from the doctrine of the cases cited in note five unless and until the Supreme Court, in a case

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[7] In O'Donoghue v. U. S., 289 U. S. 516, 550, the court said:

" 'It is a maxim, not to be disregarded,' said Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 399, 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "

where the point is actually involved, disapproves the doctrine of those cases.

II

Where the court has jurisdiction of the subject matter and the parties are before it and the case is within the general field of equitable jurisdiction, the objection that the plaintiff has an adequate remedy at law may be waived.[8] [fol. 129] It is only when the want of equity jurisdiction is obvious that the court should notice it of its own motion.[9]

In American Mills Cmpany v. American Surety Company, 260 U. S. 360, the plaintiff moved to dismiss respondent's cross-bill in equity on the ground respondent had an adequate remedy at law. The motion was overruled. The court held the plaintiff thereafter waived the objection by failing to renew it and by answering and introducing proof on the merits.

After the trial court had overruled the motions of the defendants to dismiss the bills on the ground that the Insurance Company had an adequate remedy at law, the defendants answered over. In their answers they did not again challenge the equity jurisdiction. Nor did defendants challenge the allegations of paragraph eight of the bills by any proper pleading, since the facts averred in paragraph eight of the bills, concerning which they alleged want of sufficient knowledge or information to form a belief, were clearly within their knowledge;[10] and equity rule thirty abolishes

[8] Lyons Milling Co. v. Goffe & Carkener (C. C. A. 10) 46 F. (2d) 241, 245; Duignan v. U. S., 274 U. S. 195, 199; Twist v. Prairie Oil Co., 274 U. S. 684, 689-691; American Mills Company v. American Surety Company, 260 U. S. 360, 363; Perego v. Dodge, 163 U. S. 160, 164; Reynes Dumont, 130 U. S. 354, 395; Kilbourn v. Sunderland, 130 U. S. 505, 514; Tyler v. Savage, 143 U. S. 79, 96-97; Southern P. R. R. Company v. U. S., 200 U. S. 341, 349; Brown v. Lake Superior Iron Company, 134 U. S. 530, 536.

[9] Matthews v. Rodger, 284 U. S. 521, 524; Singer Sewing Machine Company v. Benedict, 229 U. S. 481, 484.

[10] Fox Film Corp. v. Gross (D. C. N. Y.) 56 F. (2d) 457; Deseret Sav. Bank v. Walker, 2 P. (2d) 609, 612, 78 Utah, 241; Dietlin v. General American L. Ins. Co., 41 P. (2d) 979, 985, — Cal. App. —; First Sav. Bank of Ogden v. Brown, 54 P. (2d) 237, 241, — Utah —.

the plea of general denial and an allegation of a bill not specifically denied will be taken as admitted. Hass v. U. S. (C. C. A. 8) 17 F. (2d) 894.

Instead of continuing to challenge the jurisdiction in equity, the defendants filed answers properly raising issues going solely to the merits, and stipulated that the equity suits might be tried in advance of the actions at law. This conduct, in my opinion, constituted a waiver of the objection to the equity jurisdiction on the ground that the Insurance Company had an adequate remedy at law.

For the foregoing reasons, it is my conclusion that our original opinion should be withdrawn and the decrees below [fol. 130] affirmed; and I respectfully dissent from the opinion of the court on the petition for rehearing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER, No. 1268, DENYING PETITION FOR REHEARING—
September 8, 1936

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER, No. 1269, DENYING PETITION FOR REHEARING—
September 8, 1936

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied;

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE, Nos. 1268 and 1269—Filed September 8, 1936

Comes now The American Life Insurance Company, appellee in the above-entitled cases, and says that it has filed a petition for rehearing and brief in support thereof herein, and moves the court for an order that issuance of mandate herein be stayed for a reasonable time after counsel for appellee are notified that the petition for rehearing is denied, if such be the action of the court, in order to afford appellee an opportunity to file a petition for writ of certiorari.

Jos. G. Carey, Henry V. Gott, Attorneys for Appellee.

[fol. 131] STATE OF KANSAS,
Sedgwick County, ss:

On this fourteenth day of January, 1936, before me, the undersigned, a notary public in and for the county and state aforesaid, personally appeared Jos. G. Carey, of lawful age, who being by me first duly sworn, on his oath deposes and says:

That he is one of the attorneys for the appellee, The American Life Insurance Company, in the foregoing cases and court; that a petition for rehearing has been filed herein in good faith; that it is not made for the purpose of delay and that in the event this court denies said petition for rehearing, said appellee desires to file a petition for a writ of certiorari in the Supreme Court, and will, in such event, thereafter file said petition in good faith, with due diligence, and without unreasonable delay.

Jos. G. Carey.

Subscribed in my presence and sworn to before me by the above-named Jos. G. Carey this 14 day of January, 1936. Ethyl McMurry, Notary Public. My commission expires February 22, 1939. (Notarial Seal.)

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER, NO. 1268, GRANTING STAY OF MANDATE—September 14, 1936

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under [fols. 132-133] Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER, NO. 1269, GRANTING STAY OF MANDATE—September 14, 1936

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 440

ORDER ALLOWING CERTIORARI—Filed November 16, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 135] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 441

ORDER ALLOWING CERTIORARI—Filed November 16, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 40,980, 40,981. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 440. The American Life Insurance Company, petitioner, vs. Reese Smith Stewart, Junior, and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, deceased. Term No. 441. The American Life Insurance Company, petitioner, vs. Ora Inez Stewart and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, deceased. Petition for writs of certiorari and exhibit thereto. Filed October 6, 1936. Term Nos. 440, O. T., 1936, 441, O. T. 1936.

Office - Supreme Court, U.S.
FILED
OCT 6 1936
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 440.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

No. 441.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

ORA INEZ STEWART AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

PETITION FOR WRITS OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

EARLE W. EVANS,
JOSEPH G. CAREY and
HENRY V. GOTT,
of Wichita, Kansas,
CHARLES M. BLACKMAR,
WILLIAM C. MICHAELS and
KENNETH E. MIDGLEY,
of Kansas City, Missouri,
Counsel for Petitioner.

E. L. MENDENHALL, INC., 8 WEST 9TH ST., KANSAS CITY, MO.

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And hereunder:

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. .....

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

No. .....

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

ORA INEZ STEWART AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

PETITION FOR WRITS OF CERTIORARI.

May it please the Court: The petitioner, American Life Insurance Company, a corporation, respectfully shows to this Honorable Court:

A.

Summary of Matter Involved.

Two bills in equity were filed September 3, 1932 by petitioner, a Colorado corporation, against respondents, citizens of Kansas, to cancel two life insurance policies for $5000.00 each on the life of one Reese Smith Stewart, a citizen of Kansas, (R. 14). The policies were issued on February 23, 1932 (R. 10) on one application (R. 33, 60), and are identical except that respondent, Reese Smith Stewart, Junior, the insured's son, was named beneficiary in one, whereas respondent, Ora Inez Stewart, his wife, was named beneficiary in the other (R. 100). Insured was then 63 years old (R. 37). Insured died May 31, 1932 (R. 36). Petitioner duly tendered to respondents the premiums paid with interest and concurrently notified the beneficiaries that it elected to rescind and cancel the policies for fraud in the procurement (R. 8-24); and tender was refused (R. 8-24).

The grounds for cancellation alleged in the bills were concealment of material facts and fraudulent misrepresentations made by the insured in the application for the policies and also the presence in the policies of a clause providing that they would be incontestable

> "* * * after one year from its date of issue if the insured be then living, otherwise after two years from its date of issue." (R. 6).

The bills also alleged inadequacy of a remedy at law (R. 6, 14). September 26, 1932 respondents filed

motions to dismiss, alleging that the bills were without equity and that on the face of the bills petitioner had an adequate remedy at law. (R. 14). October 27, 1932 petitioner filed supplemental bills reciting that since the original bills were filed, and on October 11, 1932, respondents had filed law actions on the policies in the same court, and prayed that prosecution of such actions be restrained until the equity suits were finally determined. (R. 16, 20). July 28, 1933 the motions to dismiss the bills were overruled (R. 19). No hearing was had on the supplemental bills because counsel stipulated August 29, 1933 (R. 20), (approved by the court on August 31, 1933 (R. 20)) as follows:

> "That the suit in equity shall be tried to the court before said law action is tried, Provided, However, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.
>
> "It is further agreed by the parties hereto that if this stipulation meets with the approval of the court, that a stipulation and agreement to the same effect shall be entered in said law action.
>
> "It is further agreed that if this stipulation does not receive the approval of the court, that then and in that event Complainant's application for an order restraining and enjoining further proceedings in said law action shall be presented to the court as soon as it will hear the same."

October 5, 1933 the court, counsel consenting, consolidated the equity suits for trial (R. 25). October

10, 1933 respondents filed amended answers (R. 23) admitting the formal jurisdictional averments; alleging that petitioner had waived the alleged misstatements in the application and that it was estopped from insisting that they were untrue. The answer contains no specific denial of the allegation in paragraph 8 of the bills (R. 6) of inadequacy of legal remedy, and contains no averment that petitioner had an inadequate legal remedy (R. 23-25); it did deny generally "each and every" allegation in the bill "not herein admitted, controverted or specifically denied" (R. 25) and the prayer in the answer is as follows (R. 25):

> "Wherefore, these defendants having fully answered to the said bill of complaint in so far as they are advised the same is material and necessary to be answered unto, deny that the said complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, or any relief whatsoever, and pray to be hence dismissed with their reasonable charges in this behalf most wrongfully sustained."

January 3, 1934, *et seq.* the cases were tried (R. 27) pursuant to the written stipulation and without objection by respondents to equitable jurisdiction (R. 27). December 7, 1934 the court filed findings of fact (R. 32) and conclusions of law (R. 43) finding that the policies had been secured by fraud and should be cancelled and on the same day entered a joint decree cancelling the policies (R. 44) from which appeals were duly taken to the Circuit Court of Appeals for the Tenth Circuit. Stipulation for consolidated transcript was filed (R. 100). The cases were briefed

and argued as a single case (R. 1). On December 16, 1935 the Circuit Court of Appeals, without considering the merits, filed an opinion (per Phillips, Circuit Judge, (R. 107) reported in 80 Fed. (2d) 600), reversing the decrees and remanding the cases with instructions to dismiss the bills without prejudice to setting up the alleged fraud as a defense to the law actions (R. 107, 110). The court held that petitioner had an adequate remedy at law, that the answer challenged the court's equity jurisdiction and that this challenge was not waived by the stipulation above quoted. Petitioner duly filed petitions for rehearing and suggestions in support (R. 111). The court ordered oral argument on the petitions; this was had June 4, 1936 (R. 115). September 8, 1936 the Court of Appeals filed an opinion (R. 116) (per Lewis, Circuit Judge) and orders (R. 130), denying the petitions for rehearing. Judge Phillips dissented in a separate opinion (R. 122).

The issues herein presented are demonstrated by Judge Phillips' reasons for dissent. He stated that equity jurisdiction was determined by the facts existing "when the bills were filed," that jurisdiction was not lost "because an adequate remedy at law thereafter became available," that the incontestable clause, enabling a beneficiary to defeat the right to contest by delaying action, absenting himself, or otherwise preventing service, provided the requisite special circumstance to give equity jurisdiction to cancel if no law action was pending, and that "a remedy at law is inadequate, if it may be given or withheld at the will

of the opposing party." He further stated that the objection of adequacy of legal remedy was waived by failure to specifically plead it in the answer, pleading only to the merits, and stipulating for previous trial of the equity suits.

September 14, 1936 the Court of Appeals, upon application made therefor, ordered the mandates stayed for thirty days (R. 131-132).

B.

Questions Presented.

1. Where a fraudulently procured life insurance policy contains a two-year incontestable clause (which, concededly, under the law requires contest, if any, to be made by judicial proceeding within that period) and the insured dies within such period and no law action has been brought on the policy, may the insurer file a suit in equity to cancel the policy?

2. Conceding the right to file such a suit, where, after it is filed and during such contestable period, a law action is filed on the policy, is the insurer entitled to stay in equity and have the prior equity suit tried first, or must the equity suit be dismissed and insurer be relegated to its defense by answer in the subsequently filed law action?

3. In an equity suit to cancel a life insurance policy for fraud in the procurement, does the defendant waive the objection that plaintiff has an adequate remedy at law by failing to make such objection in his answer, by raising issues going only to the merits,

by not specifically denying in the answer the allegation in the petition that plaintiff has no adequate remedy at law, by stipulating in writing, approved by the court, that the equity suit shall be tried before trial is had in a subsequently instituted law action on the policy and by trying such suit as an equity suit without objection?

C.

Reasons Relied On for the Allowance of the Writs.

1. The decision of the Court of Appeals is in conflict with the following decisions of the Supreme Court:

Dawson, Attorney General, etc., et al. v. *Kentucky Distilleries and Warehouse Company,* 255 U. S. 288, 296.

Mutual Life Insurance Company v. *Hurni Packing Company,* 263 U. S. 167, 177.

Enelow v. *New York Life Insurance Company,* 293 U. S. 379, 384.

Duignan v. *U. S.,* 274 U. S. 195, 199.

American Mills Company v. *American Surety Company,* 260 U. S. 360, 363.

The Pusey & Jones Company v. *Hanssen,* 261 U. S. 491, 500.

2. The decision of the Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeals:

(Fourth Circuit)

Jefferson Standard Life Insurance Company v. *Keeton,* 292 F. 53, 54-56.

Jones v. *Reliance Life Insurance Company,* 11 F. (2d) 69, 70.

Brown v. *Pacific Mutual Life Insurance Company,* 62 F. (2d) 711, 712.

New York Life Insurance Company v. *Triesdale,* 79 F. (2d) 481, 485.

Pacific Mutual Life Insurance Company v. *Parker, et ux.,* 71 F. (2d) 872, 874.

(Fifth Circuit)

Jefferson Standard Life Insurance Company v. *McIntyre,* 294 Fed. 886, 888.

(Sixth Circuit)

New York Life Insurance Company v. *Seymour,* 45 F. (2d) 47, 48, 49.

Rose v. *Mutual Life Insurance Company of New York,* 19 F. (2d) 280, 282.

(Seventh Circuit)

Harnischfeger Sales Corporation v. *National Life Insurance Company,* 72 F. (2d) 921, 923.

(Eighth Circuit)

Peake v. *Lincoln National Life Insurance Company,* 15 F. (2d) 303, 305, 306.

Lincoln National Life Insurance Company v. *Hammer, et al.,* 41 F. (2d) 12, 17.

(Ninth Circuit)

Massachusetts Bonding and Insurance Company v. *Anderegg*, 83 F. (2d) 622, 624.

3. The decision of the Circuit Court of Appeals is in conflict with the weight of authority.

(See cases under 1 and 2.)

4. The Court of Appeals has misinterpreted and misapplied the decisions of this Court in *DiGiovanni* v. *Camden Fire Insurance Company*, 296 U. S. 64, and *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379.

Wherefore, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in these cases numbered and entitled on its docket, numbers 1268 and 1269 in Equity, and entitled *Reese Smith Stewart, Junior, and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, Deceased, appellants*, v. *The American Life Insurance Company, a corporation, appellee*, and *Ora Inez Stewart and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, Deceased, appellants*, v. *The American Life Insurance Company, a corporation, appellee*, and that the judgment of the Tenth Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may

have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioner will ever pray.

The American Life Insurance Company,
a Corporation, Petitioner,
By Earle W. Evans,
Joseph G. Carey and
Henry V. Gott,
of Wichita, Kansas,
Charles M. Blackmar,
William C. Michaels and
Kenneth E. Midgley,
of Kansas City, Missouri,
Counsel for Petitioner.

Supreme Court of the United States

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No. .....

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

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ORA INEZ STEWART AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

OPINIONS BELOW.

The trial court filed no opinion; its separate findings of fact and conclusions of law appear at pp. 32-43 of the Record. The opinion of the Court of Appeals (R. 107)

is reported in 80 F. (2d) 600; the opinion of the court and the dissenting opinion of Judge Phillips on petition for rehearing are not yet reported but appear in the record at pages 116 to 130.

II.

JURISDICTION.

(1) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, being now Section 347, Title 28, U. S. C. A. page 359.

Ex parte Lau Ow Bew, 141 U. S. 583.

(2) The date of the judgment in the trial court is December 7, 1934 (R. 44). Appeals were duly perfected and the decrees of the Circuit Court of Appeals were entered December 16, 1935 (R. 110-111). Petitions for rehearing were filed January 13, 1936 (R. 115), argued June 4, 1936 (R. 115) and denied September 8, 1936 (R. 130). Thirty days stay of mandate was granted September 14, 1936 (R. 131).

III.

STATEMENT OF THE CASE.

Under the heading, A, in the petition, *ante*, pp. 2-6, is a full statement of the case so far as material to the consideration of the questions presented, and, in the interest of brevity, the statement is not here repeated.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Tenth Circuit erred:

1. In holding that the bills of complaint did not state facts entitling plaintiff to equitable relief (cancellation of insurance policies) and ordering a dismissal of the bills.

2. In holding that respondent's answers raised the question of adequacy of legal remedy.

3. In holding that the after filed law actions ousted equity of its jurisdiction.

4. In holding that the stipulation, approved by the trial court, that the equity suits should be tried in advance of the law actions, was not a waiver of any objection to the equity jurisdiction on the ground that petitioner had an adequate remedy at law.

V.

SUMMARY OF ARGUMENT.

POINT A.

(Specification 1.)

The bills stated good cases in equity. Cancellation of instruments procured by fraud is a well settled field of equity jurisdiction. The incontestable clause required contest in court to preserve petitioner's rights, and no law action was pending at the time the bills were filed in which contest could be made by answer. These facts pre-

sented a "special circumstance" authorizing petitioner to bring its bills to cancel when and as the bills were filed.

Mutual Life Insurance Company v. *Hurni Packing Company*, 263 U. S. 167, 174, 176.

Story Eq. Juris. (13th Ed.) Sec. 995.

POINT B.

(Specification 3.)

Since petitioner was well lodged in equity by filing the bills September 3, 1932, the equity cases had the right of way, and were properly tried first even though on October 11, 1932 law actions were brought on the policies. And hereunder:

(1)

When a court of equity properly acquires jurisdiction it retains it until complete justice is done between the parties. Whether the equity court has jurisdiction depends on the facts and circumstances existing at the time the bill is filed, not by those that may subsequently develop.

Bank of Kentucky v. *Stone, et al.*, 88 Fed. 383, 391.

Dawson, Attorney General, etc., et al. v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296.

10 Ruling Case Law Sec. 120.

(2)

The case is controlled by the rule announced by this court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296, that equitable jurisdiction is not "lost because since

the filing of the bill an adequate legal remedy may have become available."

(3)

The decision of the Circuit Court of Appeals is on these points in conflict with decisions in other circuits in analogous cases; indeed, it is in conflict with *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 384, on which it purports to be based.

See cases cited under C2 of the petition, *supra*, pages 7-9.

POINT C.

(Specifications 2 and 4.)

Section 384, 28 U. S. C. A., providing that no equity suit shall be maintained if plaintiff has an adequate remedy at law, may be waived by defendant, and was waived in these cases both by pleading to the merits only, by stipulating in writing for trial of the equity suits in advance of the law actions and by proceeding to trial without objecting to equity jurisdiction.

American Mills Company v. *American Surety Company*, 260 U. S. 360, 363.
Duignan v. *U. S.*, 274 U. S. 195, 199.
Twist v. *Prairie Oil Co.*, 274 U. S. 684, 689-691.
Perego v. *Dodge*, 163 U. S. 160, 164.
Reynes v. *Dumont*, 130 U. S. 354, 395.
Kilbourn v. *Sunderland*, 130 U. S. 505, 514.
Tyler v. *Savage*, 143 U. S. 79, 96-97.
Southern P. R. R. Co. v. *U. S.*, 200 U. S. 341, 349.
Brown v. *Lake Superior Iron Co.*, 134 U. S. 530, 536.
Singer Sewing Machine Co. v. *Benedict*, 229 U. S. 481, 484.
Lyons Milling Co. v. *Goffe & Carkener*, (C. C. A. 10) 46 F. (2d) 241, 245.

VI.

ARGUMENT.

POINT A.

(Specification 1.)

The Bills State Good Causes of Action in Equity.

Unquestionably the bills alleged facts showing fraud in the procurement of the policies. The incontestable clause was pleaded and the bills alleged:

> "8. • • • That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity."

The bills further pleaded tender of return of premiums, refusal of the tender, and a renewal of tender in the bills. The prayer was for cancellation and general relief. This Court held in *Mutual Life Insurance Com-*

pany v. *Hurni Packing Company*, 263 U. S. 167, 174, 176, that where a policy contains such an incontestable clause as is here involved, its benefits inure to the beneficiary in the event of the death of the insured within the limited period, and that unless the policy is contested by the insurer within the period stipulated, all defenses, including fraud, are barred. It is the settled rule in the national courts and many state courts that "contest" means "contest in court," either by a bill in equity or by answer filed in a law action. See cases cited *supra*, pages 7-9, also in Judge Phillips' dissenting opinion (R. 124, 125). Many of such cases expressly point out that the presence of such a clause provides that "special circumstance" which was wanting in *Insurance Company* v. *Bailey*, 80 U. S. (13 Wall.) 616, and *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288, neither of which cases involved a policy containing such a clause. This is necessarily so, since such clause will result in loss of defenses long prior to the time when a claim on the policy will be barred by running of statutory limitations. The right to sue in equity to cancel if no law action is pending must be recognized, otherwise a beneficiary can effectuate insured's fraud by going into another jurisdiction (*Peake* v. *Lincoln National Life Insurance Company*, 15 Fed. (2d) 303, 306, C. C. A. 8), or disappearing or going abroad, (*New York Life* v. *Panagiotopolas*, 80 Fed. (2d) 136, 137, C. C. A. 1) and by delaying suit at law until the contestable period expires. Death of the beneficiary may also prevent contest if the insurer must await the near expiry of the period of contest before proceeding in equity. Further, the doctrine of "you must delay

your equity suit until just before the contestable period expires and hope that the beneficiary will be then living and locatable for suit" invites laches and delay which equity has traditionally abhorred. It makes a dead letter of the ancient maxim "*Vigilantibus et non dormientibus jura subveniunt.*" Petitioner had the right to go into equity when it did. No law action was then pending or threatened. The bills stated good cases in equity.

POINT B.

(Specification 3.)

Plaintiff Was Entitled to Stay in Equity and to Have Its Suits First Tried Even Though Law Actions Thereafter Were Brought on the Policies.

The opinion of the Court of Appeals on this point is in direct conflict with decisions in other circuits where the question has been presented, and with the weight of authority. (See cases cited, *supra,* pp. 7-9.) Being well lodged in equity, plaintiff was entitled to stay there. Justice Harlan on the circuit (Judges Taft and Lurton concurring) held in *Bank of Kentucky* v. *Stone,* 88 Fed. 383, 391:

> "However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'"

This Court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries*, 255 U. S. 288, 296, definitely answered the question in the following language:

> "Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available."

The decision of the Circuit Court of Appeals is in direct conflict with this principle.

This Court in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 384, ruled that an equitable counterclaim would not lie in a law action by a beneficiary, but expressly distinguished and (it would appear) thereby tacitly approved the doctrine of those cases in other circuits opposed to the opinion. This court there said:

> "Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable."

It is apparent that the opinion misapplies and erroneously interprets the *Enelow* case. The same conclusion follows as to *DiGiovanni* v. *Camden Fire Insurance Association*, 296 U. S. 64. That case involved a fire insurance policy, there was no incontestable clause, and the bills pleaded expressly that law actions were about to be filed. The situation was in no way analogous: See Judge Phillips' dissenting opinion, (R. 127).

POINT C.

(Specifications 2 and 4.)

Respondents, by Answering to the Merits Only, by Not Specifically Denying Inadequacy of Legal Remedy, and by Stipulating for Trial of the Equity Cases First and Proceeding to Trial in Equity Without Any Objection, Waived Any Objection That Petitioner Had an Adequate Remedy At Law.

The district court had jurisdiction of the parties and the subject matter, the bills presented cases properly within the field of general equity jurisdiction (cancellation of instruments for fraud), motions to dismiss were overruled, and the answers filed neither specifically denied inadequacy (Equity Rule 30), nor affirmatively alleged adequacy of the legal remedy. Further, respondents expressly stipulated, with approval of the district court, for trial of the equity suits first. The objection that there is an adequate legal remedy, in a case properly within the general field of equity jurisdiction, is not an objection to the power or ultimate jurisdiction of the court to hear and decide the case. Such objection may be waived by defendant, even in a case where the remedy at law is admittedly adequate (which is not so here). *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 363. In these cases not only was there a total absence of *any* remedy at law when the bills were filed, but it would be impossible to conceive of a stronger case of waiver —an express declaration filed in the cause and approved by all parties and the court that the equity suits were to be tried first. Under the decisions of

this court, this left no question in the case of adequacy of legal remedy.

(See cases cited under Summary of Argument, Point "C," *supra,* page 15.)

VII.

CONCLUSION.

The importance of this case cannot be overstated. Practically all life insurance policies now issued contain an incontestable clause, and in many states are required by statute to contain such a clause. A number of companies (R. 116) were permitted to file briefs and orally argue, *amici,* in support of the motions for rehearing. If the decision stands, then at least in the Tenth Circuit, beneficiaries of policies secured by fraud will be encouraged to attempt to effectuate the fraud by delaying suit, with the hope that insurer's defense will be barred by the contestable clause, well knowing that if the company moves to protect its rights by equity suit, the dismissal of such suit can be secured by merely filing a law action. We do not believe the courts should thus tolerate circuity of action, encourage delay and penalize vigilance. And certainly, the rights of an insurer in this respect should not vary with the circuit in which fraud is perpetrated upon it.

We respectfully pray that the petition for writs of certiorari be granted to the Tenth Circuit Court of Appeals in these cases.

EARLE W. EVANS,
JOSEPH G. CAREY and
HENRY V. GOTT,
of Wichita, Kansas,
CHARLES M. BLACKMAR,
WILLIAM C. MICHAELS and
KENNETH E. MIDGLEY,
of Kansas City, Missouri,
Counsel for Petitioner.

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CHARLES ELMORE CR
CL

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 440.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

No. 441.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER.

[illegible] W. Evans,
[illegible] G. Carey and
[illegible] V. Goss,
of Wichita, Kansas,

[illegible] G. Mossman,
[illegible] R. Kenny,
of [illegible],

Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1936.

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BRIEF OF PETITIONER.

I.

OPINIONS BELOW.

The trial court filed no opinion; its separate findings of fact and conclusions of law appear at pages 33-45 of the

Record. The opinion of the Court of Appeals (R. 110) is reported in 80 F. (2d) 600; the opinion of the court and the dissenting opinion of Judge Phillips on petition for rehearing are reported in 85 F. (2d) 791.

II.

JURISDICTION.

Application was made to this court for writ of certiorari under Rule 38 and under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, being now Section 347, Title 28, U. S. C. A., page 359, and was the proper remedy.

Ex Parte Lau Ow Bew, 141 U. S. 583.

Writs of certiorari were granted November 16, 1936 (R. 137), *The American Life Insurance Company* v. *Stewart,* .... U. S. ...., 57 S. Ct. 189, 190.

III.

STATEMENT.

These are equity suits filed in the United States District Court, at Wichita, Kansas, by petitioner, a Colorado corporation, against respondents, citizens of Kansas, to cancel, for alleged fraud in the procurement, two life insurance policies for $5,000.00 each, on the life of one Reese Smith Stewart, a citizen of Kansas (R. 1). The policies were issued on February 23, 1932 (R. 10) on one application (R. 34, 62), and are identical except that respondent, Reese Smith Stewart, Junior, the insured's son, was named beneficiary in one, whereas respondent, Ora Inez Stewart, his wife, was named beneficiary in the other (R. 37). Insured died May 31, 1932 (R. 38). Thereafter, petitioner discovered the alleged fraud and duly tendered

to respondents the premiums paid, with interest, and concurrently notified the beneficiaries that it elected to rescind and cancel the policies for fraud in the procurement (R. 8, 25); and tender was refused (R. 8, 25). Thereafter, on September 3, 1932, the bills were filed (R. 1). No law actions on the policies were then pending or threatened.

The grounds for cancellation alleged in the bills were concealment of material facts and fraudulent misrepresentations (medical history) made by the insured in the application for the policies (R. 3-6), and also the presence in the policies of a clause providing that they would be incontestable, except for nonpayment of the premium,

> "* * * after one year from its date of issue if the insured be then living, otherwise after two years from its date of issue * * *" (R. 6, 25).

The bills also alleged inadequacy of a remedy at law (R. 8, 9). September 26, 1932 respondents filed motions to dismiss, alleging that the bills were without equity and that on the face of the bills petitioner had an adequate remedy at law (R. 14). October 27, 1932 petitioner filed supplemental bills reciting that since the original bills were filed, and on October 11, 1932, respondents had filed law actions on the policies in the same court, and prayed that prosecution of such actions be restrained until the equity suits were finally determined (R. 16, 21). July 28, 1933 the motions to dismiss the bills were overruled (R. 20). No hearing was had on the supplemental bills because counsel stipulated August 29, 1933 (R. 21), (approved by the court on August 31, 1933 (R. 22)) as follows (R. 21):

> "* * * Therefore, in order to expedite the decision of the matters in controversy, the parties hereto * * * stipulate and agree:

"That the suit in equity shall be tried to the court before said law action is tried, Provided, However, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.

"It is further agreed by the parties hereto that if this stipulation meets with the approval of the court, that a stipulation and agreement to the same effect shall be entered in said law action.

"It is further agreed that if this stipulation does not receive the approval of the court, that then and in that event Complainant's application for an order restraining and enjoining further proceedings in said law action shall be presented to the court as soon as it will hear the same."

October 5, 1933, the court, counsel consenting, consolidated the equity suits for trial (R. 26). October 10, 1933, respondents filed amended answers (R. 23) admitting the formal jurisdictional averments; alleging that petitioner had waived the alleged misstatements in the application and that it was estopped from insisting that they were untrue. The answers contain no specific denial of the allegation in Paragraph 8 of the bills (R. 6) of inadequacy of legal remedy, and contain no averment that petitioner had an adequate legal remedy (R. 23-26); they denied generally "each and every" allegation in the bills "not herein admitted, controverted or specifically denied" (R. 25) and prayed that respondents be dismissed (R. 26).

January 3, 1934, *et seq.* the cases were tried (R. 28) pursuant to the written stipulations and without objection by respondents to equitable jurisdiction (R. 28). December 7, 1934 the court filed findings of fact

(R. 33) and conclusions of law (R. 45) finding that the policies had been secured by fraud and should be cancelled and on the same day entered a joint decree cancelling the policies (R. 45) from which appeals were duly taken to the Circuit Court of Appeals for the Tenth Circuit. Stipulation for consolidated transcript was filed (R. 105). The cases were briefed and argued as a single case (R. 1). On December 16, 1935, the Circuit Court of Appeals, without considering the merits, filed an opinion (per Phillips, Circuit Judge (R. 111), reported in 80 F. (2d) 600), reversing the decrees and remanding the cases with instructions to dismiss the bills without prejudice to setting up the alleged fraud as a defense to the law actions (R. 113). The court held that petitioner had an adequate remedy at law, that the answers challenged the court's equity jurisdiction and that such challenge was not waived by the stipulation above quoted. Petitioner duly filed petitions for rehearing and suggestions in support (R. 115). The court ordered oral argument on the petitions; this was had June 4, 1936 (R. 118). September 8, 1936 the Court of Appeals filed an opinion (R. 119) (per Lewis, Circuit Judge) 85 F. (2d) 791, and orders (R. 134), denying the petitions for rehearing. Judge Phillips dissented in a separate opinion (R. 125), 85 F. (2d) 794.

September 14, 1936 the Court of Appeals, upon application made therefor, ordered the mandates stayed for thirty days (R. 136). Petition for certiorari was filed October 6, 1936. Writs of certiorari were granted November 16, 1936 (R. 137). ... U. S. ... ; 57 S. Ct. 189, 190.

The questions presented by the foregoing facts are as follows:

1. Where a fraudulently procured life insurance policy contains a two-year incontestable clause and the insured dies within such period and no law action has been brought on the policy, may the insurer file a suit in equity to cancel the policy?

2. Conceding the right to file such a suit, where, after it is filed and during such contestable period, a law action is filed on the policy, is the insurer entitled to stay in equity and have the prior equity suit tried first, or must the equity suit be dismissed and insurer be relegated to its defense by answer in the subsequently filed law action?

3. In such an equity suit, does the defendant waive any objection that plaintiff has an adequate remedy at law by failing to make such objection in his answer, by raising issues going only to the merits, by not specifically denying in his answer the allegation in the bill that plaintiff has no adequate remedy at law, by stipulating in writing, approved by the court, that the equity suit shall be tried before trial is had in a subsequently instituted law action on the policy and by trying such suit as an equity suit without objection?

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Tenth Circuit erred:

1. In holding that the bills of complaint did not state facts entitling petitioner to equitable relief (cancellation of insurance policies) and ordering a dismissal of the bills.

2. In holding that respondents' answers raised the question of adequacy of legal remedy.

3. In holding that the after filed law actions ousted equity of its jurisdiction.

4. In holding that the stipulation, approved by the trial court, that the equity suits should be tried in advance of the law actions, was not a waiver of any objection to the equity jurisdiction on the ground that petitioner had an adequate remedy at law.

V.

SUMMARY OF ARGUMENT.

POINT A (Specification 1).

The bills stated good cases in equity. Cancellation of instruments procured by fraud is a well-settled field of equity jurisdiction. The incontestable clause required contest in court to preserve petitioner's rights, and no law action was pending at the time the bills were filed in which contest could be made by answer. These facts demonstrate that petitioner did not have any remedy at law, adequate or otherwise, and presented a "special circumstance" authorizing petitioner to bring its bills to cancel when and as the bills were filed.

Mutual Life Insurance Company v. *Hurni Packing Company*, 263 U. S. 167, 174, 176.

Story, Eq. Juris (13th Ed.), Sec. 995.

2 Black on Rescission & Cancellation, Sec. 655, p. 1497.

9 Corpus Juris 1160.

See, also, cases cited under Point B (4), *post*, pp. 9-10.

POINT B (Specification 3).

Since petitioner was well lodged in equity by filing the bills September 3, 1932, the equity cases had the right

of way, and were properly tried first even though thereafter, on October 11, 1932, law actions were brought on the policies. And hereunder:

(1)

When a court of equity properly acquires jurisdiction it will retain it until complete justice is done between the parties.

McGowan v. *Parish*, 237 U. S. 285, 296.
Alexander v. *Hillman*, 296 U. S. 222, 242.
21 Corpus Juris, p. 134, Sec. 117.
Also cases cited under Point B (4), *post*, pp. 9-10.

(2)

Whether an equity court has jurisdiction depends on the facts and circumstances existing at the time the bill is filed and not by those that may subsequently develop. A remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.

Boyce's Executors v. *Grundy*, 3 Pet. 210, 215.
Sullivan v. *Portland, etc., R. R. Co.*, 94 U. S. 806, 811.
Dawson, Atty. General, etc., et al. v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296.
Busch v. *Jones*, 184 U. S. 598, 600.
Clark v. *Wooster*, 119 U. S. 322, 325.
Bank of Kentucky v. *Stone et al.*, 88 Fed. 383, 391.
See, also, the cases cited under Point B (4), *post*, pp. 9-10.

(3)

The case is controlled by the rule announced by this court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296,

that equitable jurisdiction is not "lost because since the filing of the bill an adequate legal remedy may have become available."

See, also, *Busch* v. *Jones*, 184 U. S. 598, 600.

(4)

The foregoing points have been the subject of discussion and decision in policy cancellation cases, similar to the ones at bar, in other Circuit Courts of Appeal and such decisions declare the principles above stated, and the decision of the Tenth Circuit Court of Appeals is, on such points, in direct conflict with such decisions in other Circuits; they are:

(Fourth Circuit)

Jefferson Standard Life Insurance Company v. *Keeton*, 292 Fed. 53, 54-56.

Jones v. *Reliance Life Insurance Company*, 11 F. (2d) 69, 70.

Brown v. *Pacific Mutual Life Insurance Company*, 62 F. (2d) 711, 712.

New York Life Insurance Company v. *Truesdale*, 79 F. (2d) 481, 485.

Pacific Mutual Life Insurance Company v. *Parker, et ux.*, 71 F. (2d) 872, 874.

(Fifth Circuit)

Jefferson Standard Life Insurance Company v. *McIntyre*, 294 Fed. 886, 888.

(Sixth Circuit)

New York Life Insurance Company v. *Seymour*, 45 F. (2d) 47, 48, 49, 73 A. L. R. 1523.

Rose v. *Mutual Life Insurance Company of New York*, 19 F. (2d) 280, 282.

(Seventh Circuit)

Harnischfeger Sales Corporation v. *National Life Insurance Company*, 72 F. (2d) 921, 922, 923.

(Eighth Circuit)

Peake v. *Lincoln National Life Insurance Company,* 15 F. (2d) 303, 305, 306.

Lincoln National Life Insurance Company v. *Hammer et al.,* 41 F. (2d) 12, 17.

(Ninth Circuit)

Massachusetts Bonding and Insurance Company v. *Anderegg,* 83 F. (2d) 622, 624, cert. den. Oct. 12, 1936, 57 S. Ct. 30.

(5)

Indeed, it would appear that the decision of the Circuit Court of Appeals is in conflict with *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379, 384, upon which the decision purports to be based.

POINT C (Specifications 2 and 4).

Section 384, 28 U. S. C. A., providing that no equity suit shall be maintained if plaintiff has an adequate remedy at law, may be waived by defendant, and was waived in these cases both by pleading to the merits only, by stipulating in writing for trial of the equity suits in advance of the law actions and by proceeding to trial without objecting to equity jurisdiction.

American Mills Company v. *American Surety Company,* 260 U. S. 360, 363.

Duignan v. *U. S.,* 274 U. S. 195, 199.

Twist v. *Prairie Oil Co.,* 274 U. S. 684, 689-691.

Perego v. *Dodge,* 163 U. S. 160, 164.

Reynes v. *Dumont,* 130 U. S. 354, 395.

Kilbourn v. *Sunderland,* 130 U. S. 505, 514.

Tyler v. *Savage,* 143 U. S. 79, 96-97.

Southern P. R. R. Co. v. *U. S.,* 200 U. S. 341, 349.

Brown v. *Lake Superior Iron Co.,* 134 U. S. 530, 536.

Singer Sewing Machine Co. v. *Benedict,* 229 U. S. 481, 484.

Lyons Milling Co. v. *Goffe & Carkener,* (C. C. A. 10) 46 F. (2d) 241, 245.

Sanders v. *Village of Riverside,* (C. C. A. 7) 118 Fed. 720, 722.

POINT D.

The decrees cancelling the policies were justified and should be affirmed.

New York Life Insurance Company v. *Griffith et al.,* (C. C. A. 10) 35 F. (2d) 945, 946.

VI.

ARGUMENT.

POINT A (Specification 1).

The bills state good causes of action in equity.

Unquestionably the bills alleged facts showing fraud in the procurement of the policies (R. 3-6). The incontestable clause was pleaded and the bills alleged (R. 6):

> "8. * * * That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is

> without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity."

The bills further pleaded tender of return of premiums, refusal of the tender, and a renewal of tender in the bills. The prayer was for cancellation and general relief. The bills followed generally those filed in similar cases cited on pages 9-10, *supra*, and held good in those cases. The Court of Appeals here thought that such bills (or some of them) were bad and so stated (R. 125, 85 F. (2d) 794), and in so stating committed error. This court held in *Mutual Life Insurance Company* v. *Hurni Packing Company*, 263 U. S. 167, 174, 176, that where a policy contains an incontestable clause similar to the one here involved, its benefits inure to the beneficiary in the event of the death of the insured within the limited period, and that unless the policy is contested by the insurer within the period stipulated, all defenses, including fraud, are barred. It is the settled rule in the national courts and many state courts that "contest" means "contest in court," either by a bill in equity to cancel or by answer filed in a law action on the policy. See cases cited *supra*, pages 9-10, also in Judge Phillips' dissenting opinion (R. 128, 129), 85 F. (2d) 794, 796. The reasons actuating the courts in thus declaring that "contest" means a contest in court are well stated by Cardozo, Chief Justice, in *Catherine Killian et al.* v. *Metropolitan Life Insurance Company*, (1929) 251 N. Y. 44, 166 N. E. 798, 64 A. L. R. 956. The brief note following that case in 64 A. L. R. 959, on "What amounts to contest within contemplation of incontestable clause," is valuable, assembling, as it does, the federal and state decisions up to 1929. The rule is the same in Kansas where insured and respondents resided. *Priest* v. *Kansas City Life Insurance Com-*

pany, 119 Kans. 23, 237 Pac. 938, 41 A. L. R. 1100. Many of such cases expressly point out the reasons why the presence of such a clause provides the "special circumstances," authorizing an equity suit to cancel which were wanting in *Insurance Company* v. *Bailey,* 80 U. S. (13 Wall.) 616, and *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288, neither of which cases involved a policy containing such a clause and are, therefore, inapplicable here. See for example, *Jefferson Standard Life Insurance Company* v. *Keeton,* (C. C. A. 4), 292 Fed. 53, 54, and *New York Life Insurance Company* v. *Seymour,* (C. C. A. 6) 45 F. (2d) 47, 48, 73 A. L. R. 1523, 1526. Similar cases are cited in *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379, 384 (margin). These cases point out the danger of defenses being lost or prejudiced, where such incontestable clauses are involved, unless equity suits to cancel are brought. The right to sue in equity to cancel if no law action is pending must be recognized, otherwise a beneficiary can effectuate insured's fraud by going into another jurisdiction (*Peake* v. *Lincoln National Life Insurance Company,* 15 F. (2d) 303, 306, C. C. A. 8), or disappearing or going abroad (*New York Life* v. *Panagiotopolas,* 80 F. (2d) 136, 137, C. C. A. 1), and as alleged in the bills here (R. 6), by delaying suit at law until the contestable period expires. Death of the beneficiary may also prevent contest if the insurer must await the near expiry of the period of contest before proceeding in equity; also, the death or the disappearances or removal of witnesses might well render it impossible for complainant to succeed if it must await the pleasure of the beneficiary. *Boyce's Executors* v. *Grundy,* 3 Peters 210, 215; *Massachusetts Bonding and Ins. Co.* v. *Anderegg et al.,* (C. C. A. 9) 83 F. (2d) 622, 625, certiorari denied Oct. 12, 1936, 57 S. Ct. 30; *Schmidt* v. *West,* (C. C. Ind. 1900) 104 Fed. 272, 274. These and other considerations

have been mentioned in one or other of the cases cited *supra*, pages 9-10. Further, any such doctrine that "you must delay filing your equity suit until just before the contestable period expires and hope that the beneficiary will be then living and locatable for suit" invites laches and delay which equity has traditionally abhorred, and, indeed, would be a dangerous yardstick. And any rule requiring complainant to "wait a reasonable length of time," even though he has a present *right* to invoke equity, would be wholly impracticable, unworkable, abortive, and would beget a multitude of divergent interpretations in the various jurisdictions and create a chaotic and intolerable condition. Any of such novel suggestions would make a dead letter of the maxim "*Vigilantibus et non dormientibus jura subveniunt,*" and overturn other tried and true principles. Petitioner had the right to go into equity when it did. No law action was then pending or threatened. The bills did indeed state good cases in equity and the Court erred in ordering their dismissal.

POINT B (Specification 3).

Petitioner was entitled to stay in equity and to have its suits first tried even though law actions thereafter were brought on the policies.

The opinion of the Court of Appeals on this point is in direct conflict with decisions in other circuits where the question has been presented, and with the weight of authority (see cases cited *supra*, pp. 9-10). Being well lodged in equity, petitioner was entitled to stay there and to have its suits tried. It was said in *Bank of Kentucky* v. *Stone*, 88 Fed. 383, 391 (Harlan, Taft, Lurton), that a remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.

This court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries,* 255 U. S. 288, 296, definitely answered the question in the following language:

> "Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available."

In the policy cancellation case of *Lincoln National Life Insurance Company* v. *Hammer,* (C. C. A. 8) 41 F. (2d) 12, 17, it was said:

> "The bill must be viewed in the light of the circumstances existing when it was brought. The jurisdiction in equity is not lost because an adequate legal remedy has become available since the bill was filed."

And to the same effect see *Busch* v. *Jones,* 184 U. S. 598, 600.

The decision of the Circuit Court of Appeals is in direct conflict with this principle.

This court in *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379, 384, ruled that an equitable counterclaim praying cancellation, would not lie in a law action by a beneficiary, but expressly distinguished and, it would appear, thereby tacitly approved the doctrine of those cases in other circuits opposed to the opinion of the Circuit Court of Appeals in the cases at bar. This court in the *Enelow* case said:

> "Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable."

It is apparent that the opinion of the Circuit Court of Appeals misapplies and erroneously interprets the *Enelow* case. The same conclusion follows as to *DiGiovanni* v.

Camden Fire Insurance Association, 296 U. S. 64. That case involved a fire insurance policy, there was no incontestable clause, and the bills pleaded expressly that law actions were about to be filed. The situation was in no way analogous. See Judge Phillips' dissenting opinion (R. 131), 85 F. (2d) 797. Other courts also have pointed out the inapplicability of the *Enelow* and *DiGiovanni* cases to situations like those presented in the suits at bar. *Hesselberg et al.* v. *Aetna Life Ins. Co.,* (C. C. A. 8) 75 F. (2d) 490, 494, certiorari denied, 296 U. S. 623; *Pacific Mut. Life Ins. Co.* v. *Hartman,* (D. C. Okla.) 10 Fed. Supp. 425, 429.

POINT C (Specifications 2 and 4).

Respondents, by answering to the merits only, by not specifically denying inadequacy of legal remedy, and by stipulating for trial of the equity cases first and proceeding to trial in equity without any objection, waived any objection that petitioner had an adequate remedy at law.

The District Court had jurisdiction of the parties and the subject matter, the bills presented cases properly within the field of general equity jurisdiction (cancellation of instruments for fraud), motions to dismiss were overruled, and the answers filed neither specifically denied inadequacy as plainly required by equity rule 30, *Hass* v. *United States,* (C. C. A. 8) 17 F. (2d) 894, 895, nor affirmatively alleged adequacy of the legal remedy and the Court of Appeals was in error in holding that the answer challenged the jurisdiction of the court. Moreover, respondents expressly stipulated, with approval of the District Court, for trial of the equity suits first "in order to expedite the decision of the matters in controversy" (R. 21). The objection that there is an adequate legal remedy, in a case properly within the general field

of equity jurisdiction, is not an objection to the power or ultimate jurisdiction of the court as a court of equity to hear and decide the case, *Pusey & Jones Company* v. *Hayssen*, 261 U. S. 491, 500. Such objection may be waived by defendant, even in a case where the remedy at law is admittedly adequate (which is not so here). *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 363. In the cases at bar not only was there a total absence of *any* remedy at law when the bills were filed, but it would be difficult to conceive of a stronger case of waiver—an express declaration filed in the cases and approved by all parties and the court that the equity suits were to be tried first.

Under the decisions of this court the stipulation for trial of the equity suits left no question in the case of adequacy of legal remedy and the Court of Appeals was in error in holding otherwise.

(See cases cited under Summary of Argument, Point "C," *supra*, pages 10-11.)

If it be suggested that, where a law action and an equity suit involving substantially the same issues are pending in the same court, it is discretionary with the court which case it will try first, which we cannot admit (compare *Great Southern Life Insurance Company* v. *Buswell*, 12 F. (2d) 244 (5 C. C. A.)), it may be pointed out that the trial court in the cases at bar elected to try the equity suits. In this connection it may be suggested that in *Jefferson Standard Life Insurance* v. *Keeton*, (C. C. A. 4) 292 Fed. 53, 56, it was properly held:

> "Nor has the equity judge any right to stay his hand until the actions at law have been tried."

POINT D.

The decrees cancelling the policies were justified and should be affirmed.

The trial court found (R. 44) that the insured "knowingly and willfully misrepresented to and concealed from the plaintiff the true facts concerning his illness in 1928 and 1929; that such misrepresentations and concealment were material to the risk and were made by the insured to induce plaintiff to issue said insurance * * *." This was sufficient to justify the decrees cancelling the policies and the findings of the court were fully supported by the evidence (R. 66 *et seq.*). Such findings will be accepted by the reviewing court in the absence of serious mistake. *New York Life Insurance Company* v. *Griffith et al.*, (C. C. A. 10) 35 F. (2d) 945, 946. And no mistake, serious or otherwise, was made by the trial court in the cases at bar.

We respectfully submit that the decision of the Circuit Court of Appeals for the Tenth Circuit should be reversed and that the decrees of the trial court should be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 440.

THE AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, as Executrix of the Estate of REESE SMITH STEWART, Deceased, *Respondents.*

No. 441.

THE AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

ORA INEZ STEWART AND ORA INEZ STEWART, as Executrix of the Estate of REESE SMITH STEWART, Deceased, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENTS.

STATEMENT.

The two life insurance policies here involved, each in the amount of $5000.00, were issued on or about February 23, 1932 (R. 37), and were delivered to Reese Smith Stewart, the insured, on or about February 28,

1932 (R. 37), the premiums having been paid (R. 7). The respondent Reese Smith Stewart, Jr., the insured's son, was named beneficiary in one policy. The respondent Ora Inez Stewart, the insured's wife, was named beneficiary in the other. Thereafter, and on April 13, 1932, the insured became ill, and on May 31, 1932, the insured died (R. 41).

The policies contained incontestability clauses which, by their terms, would not expire until February 23, 1934 (R. 12).

The insurance company, petitioner, filed these equity suits to cancel the policies on September 3, 1932 (R. 33). The beneficiaries, respondents, filed motions to dismiss on September 26, 1932, (R. 14). These motions were not considered until after March 16, 1933, when they were submitted to the Court (R. 18).

However, on October 27, 1932, between the time of the filing of the motions to dismiss and the time of their submission to the Court for consideration, the Company filed in each of these equity suits, its motions for leave to file supplemental bills of complaint (R. 15). These motions recited: (1) the filing of these equity actions, (2) the filing of the motions to dismiss by the respondents for the reason (among others) that the Company had an adequate remedy at law and that these motions were still pending, and (3) the following:

> "3. That since the filing of said bill of complaint in this suit and after each and all of the defendants herein had been duly served with subpoenas herein, and on the 11th day of October, 1932, said Reese Smith Stewart, Junior, filed in this court, by Ora Inez Stewart, his guardian, an action at law which is now pending before this court, being entitled Reese Smith Stewart, Jr.,

a minor, by Ora Inez Stewart, Guardian, Plaintiff, v. The American Life Insurance Company, a corporation, Defendant, and numbered 1398, wherein he seeks to recover the face value of said policy number 33954 in the amount of $5,000.00 together with interest thereon." (R. 15-16.)

The supplemental bills recited the filing of the law actions by the respondents and prayed that the respondents be enjoined and restrained from further prosecuting the legal actions until these equity causes had been determined and final decrees entered (R. 16-17). The supplemental bills were filed on October 27, 1932, and Orders of Court granting leave to file them were filed October 29, 1932 (R. 17).

Thereafter, and also prior to the submission of the motions to dismiss to the Court, the respondents were served with notices of application by the Insurance Company for the restraining order to be taken up before the District Court on March 13, 1933. These notices were filed and served on March 3, 1933 (R. 18).

The motions of the respondents to dismiss, and the applications of the Company for an order enjoining and restraining prosecution of the law actions by the respondents came on for hearing together on March 16, 1933 (R. 18). The applications for injunctive relief being contained in the supplemental bills only and the two matters coming on for hearing together make it obvious that the motions to dismiss, although directed at the original bills, were considered as though they were also directed at the supplemental bills of complaint.

The motions to dismiss were taken under advisement by the Court and the consideration of the matter of injunctive relief "prayed by petitioner in the original and supplemental bill" was deferred "until the court shall

have ruled on the motion of defendants to dismiss for want of equity, and if same be overruled prompt hearing be had thereon." (Quoted from the Order submitting motions to dismiss. R. 18).

On July 28, 1933, the Court overruled the motions to dismiss (R. 20).

Thereupon, and faced with the previous ruling of the Court, above-quoted in part, ordering a prompt hearing upon the application for injunctive relief (R. 18), the counsel for the respondents on August 29, 1933 entered into stipulations with counsel for the Company, subject, however, to the approval of the Court to try the suits in equity to the Court before the law actions were tried (R. 21). The Court entered orders upon the stipulations as follows:

> "It Is Therefore by the Court Ordered, That said suit in equity shall be tried to the court before said law action in said stipulation mentioned, Provided, However, that the issues in said law action shall be made up in order that said law issues thus joined shall stand ready for trial and said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the Court shall determine.
>
> "It is further Ordered that a copy of said stipulation and a copy of this order shall be filed and entered in said law action." (R. 22)

The stipulations referred to (R. 21) as well as the orders upon the stipulations (R. 22) show that the Company had submitted itself to the jurisdiction of the law Court in the law actions. In the stipulations, after reciting the filing of these equity actions and the overruling of the motions to dismiss, it is said:

> "Whereas on October 11, 1932, said defendants (beneficiaries) filed an action at law in this court

for the recovery of the proceeds of said policy of life insurance, said action being Number 1398 and styled 'Reese Smith Stewart, Junior, a minor, et al, Plaintiff, vs. The American Life Insurance Company, a corporation, Defendant,' in which said insurance company in due time filed a motion to stay proceedings therein until the suit in equity was finally determined, said insurance company having in the meantime filed its Supplemental bill of complaint setting up the filing of said law action and thereafter made application for an order restraining and enjoining all further proceedings in said law action pending the final determination of the suit in equity, and which motion and application are still pending and undetermined." (R. 21)

The records in the District Court disclose that, in conformity to the Orders entered upon the aforementioned stipulations (R. 22) the Company on September 16, 1933, filed its answers in the law actions brought by these respondents upon the policies here involved, alleging the fraudulent procurement of the policies; replies were filed by these respondents on October 10, 1933, and thereupon the law actions stood at issue almost four months prior to the trial of these causes in equity, and well within the two-year contestable period provided for in the policies (R. 6) which did not expire until February 23, 1934 (R. 12).

The company, by these answers, having thus instituted a contest of the policies in actions at law within the time limited by the incontestable clauses, had an adequate remedy at law and was not entitled to equitable relief.

These equity causes were consolidated for the purpose of trial by Court order on October 5, 1933 (R. 25), and did not come on for trial until January 3, 1934 (R. 27).

SUMMARY OF ARGUMENT.

I.

THE BILLS FAILED TO STATE GOOD CAUSES OF ACTION IN EQUITY.

The death of the insured having occurred, the claims of the beneficiaries were pure legal claims and the defenses thereto were legal defenses. The beneficiaries, respondents herein, had the right to a trial by jury. The equity jurisdiction, if any, was to prevent the threatened loss by expiration of the contestable period of the insurance company's right to contest the policies for fraud.

The insurance company failed to allege or show any threatened loss of its right to contest the policies, merely alleging that the right of contest "may" be lost. The bills, therefore, do not present any concrete question and do not set forth a justiciable controversy.

II.

PETITIONER, HAVING A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW, WAS NOT ENTITLED TO STAY IN EQUITY.

At the time respondents' motions to dismiss, for adequacy of the insurance company's legal remedy, were considered and passed upon, there were pending in the same court actions in equity brought to cancel life insurance policies by the insurance company and actions at law brought to recover on the same policies by the respondents. Unless the law actions should be tried first, the right to trial by jury guaranteed by the Constitution and statutes of the United States is left to the discretion of the trial judge, thus abrogating the right.

a. The Petitioner Had a Plain, Adequate and Complete Remedy at Law.

At the time the motions of the respondents to dismiss these equity suits were considered by the trial court, the insurance company had a plain, adequate and complete remedy at law in the law actions brought in the same court by the respondents to recover on the policies in which actions the insurance company had filed motions to stay proceedings.

The pleadings of the insurance company showed on their face that it had a plain, adequate and complete remedy at law, and that it had submitted to the jurisdiction of the court in the law actions prior to the time that the motions to dismiss the equity suits were considered by the trial court.

The records of the trial court show that the law actions brought by the respondents were at issue, and that the insurance company had interposed its defense of the fraudulent procurement of the policies therein, almost three months before the trial of these equity suits, and over four months before the expiration of the contestable period.

b. Respondents Did Not Waive the Right to Trial by Jury.

The alleged waiver had to do with the order of trial, and only by remote inference could it be construed to apply as a consent to jurisdiction and to a waiver of the right to trial by jury. The respondents had previously asserted their objections to the equity court's jurisdiction, in the regular and orderly manner, and these objections should not be overcome by mere inference.

It was apparent to the trial court from the pleadings and proceedings in the same court that a legal action was

pending which gave an adequate remedy to the complainants, and it is the duty of the court of equity, when it is obvious and apparent that a legal action provides an adequate remedy, that an equitable action should not be entertained.

III.

THE MERITS OF THESE CONTROVERSIES ARE NOT BEFORE THIS COURT.

The general merits of the controversy are not before this Court. The petition for certiorari was founded upon a procedural question and presumably was granted on that ground. The Court of Appeals in sustaining the motions to dismiss did not consider or pass upon the other assignments of error which related to the merits of the controversy, and no assignments of error, other than those which related to the procedural question, have been made by the petitioner in this Court.

ARGUMENT.

I.

THE BILLS FAILED TO STATE GOOD CAUSES OF ACTION IN EQUITY.

The substantial controversy between the parties to this action is whether or not the policies sued upon were obtained through fraudulent misrepresentation.

The death of the insured having occurred, the claims of the beneficiaries were pure legal claims, and the defenses to those claims were legal defenses.[1] The beneficiaries were by the constitution[2] and by law[3] guaranteed a right to trial by jury. The equitable grounds sought to be interposed were those to prevent an injustice which might occur if the beneficiaries did not institute a contest within the contestable period fixed by the policies.

The complainant had no right to have the alleged fraudulent misrepresentations determined by a Court of equity. The right of the Court of equity to intercede was entirely dependent upon the possible or threatened loss of complainant's defense, if a controversy was not instituted within the contestable period. Necessarily, the right of a Court of equity to intercede was dependent entirely upon the probability of losing that right.[4]

In the instance in question, the policies contained limitations of contestability of two years from the date of issue. (R. 12.) The policies were issued as of the date of the 23rd day of February, 1932. The contestable

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1 Enelow v. New York Life Ins. Co., 293 U. S. 379; Adamos v. New York Life Ins. Co., 293 U. S. 386.

2 Seventh Amendment to the Constitution of the United States.

3 Section 16 of the Judiciary Act, Act of September 24, 1789, Sec. 16, 1 Stat. at L. 82, chap. 20, Judicial Code, Sec. 267, U. S. C. Title 28, Sec. 384.

4 See Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, and cases cited in Enelow v. New York Life Ins. Co., 293 U. S. 379, 384.

period would expire on February 23rd, 1934. These actions were brought on September 3rd, 1932, seventeen months and twenty days before the right to contest would expire.

It also appears that the insured had died on May 31st, 1932 (R. 41), leaving only three months and three days within which the beneficiaries had not proceeded at law to collect the policies. This delay, considering the time necessary to furnish proof of death and reasonable opportunity to pay the claim without litigation, cannot be unreasonable unless litigation is to be encouraged.

It is pertinent to note that in the bill filed the complainant makes no allegations of threatened loss or even reasonable probability of loss, but alleges in these words:

> " * * * that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity." (R. 6.)

Under the above allegations, which are the sole allegations made to give jurisdiction to a Court of equity we have merely an abstract question; at most, a mere apprehension or fear of a remote injury. No allegations are made or facts stated to justify even an inference that the beneficiaries would not commence actions within the contestable period.

There is in fact no reasonable deduction to be made from the conduct of the parties other than that the complainant desired to try these cases in a court of equity, and thereby deprive the beneficiaries of the right to a trial by jury as guaranteed to them by the constitution.

This case is of that type of equity jurisdiction which is to prevent injury as distinguished from the types which determine controversies and adjudicate rights dependent upon facts which have occurred. They are similar to suits for injunctions to prevent continuance of injuries or of anticipated injuries. It is a fixed principal of law in the latter type of actions that the continuance of the injury or the occurring of the injury must be probable and imminent as distinguished from being possible or a mere matter of fear or apprehension or merely an abstract question. The bills, there, do not present any concrete question and therefore do not set forth any justiciable controversy.

Connecticut v. Massachusetts, 282 U. S. 660.
New York v. Illinois, 274 U. S. 488.
New Jersey v. Sargent, 269 U. S. 328.
Texas v. Interstate Commerce Commission, 258 U. S. 158.
Marye v. Parsons, 114 U. S. 325.
Foster v. Mansfield C. & L. M. R. Co., 146 U. S. 88.
Stearns v. Wood, 236 U. S. 75.

II.

PETITIONER, HAVING A PLAIN, ADEQUATE, AND COMPLETE REMEDY AT LAW, WAS NOT ENTITLED TO STAY IN EQUITY.

Arising out of this controversy and at the time that the motions to dismiss were passed upon, there were pending

in the same Court actions brought by the Insurance Company in equity and actions brought by the beneficiaries at law.

It is a certainty that the pendency of the equitable actions did not preclude the bringing of the actions at law, and if the equitable actions are not suspended or subject to dismissal on account of the pendency of the legal actions, then we would have pending in the same Court a legal action and an equitable action in which the entire controversy could be fully and finally determined. The only substantial differences between the two actions being that the equitable actions would be tried by the Court and the legal action would be tried by a jury.

The necessities of that situation or the requirements of the law would not require either action to be tried first, that is, if complainant's contentions are sound. We would therefore have the situation of a litigant's right to a trial by jury being dependent upon the discretion, the convenience of the Court or other circumstances and reasons by which the trial Court would determine in each instance which case would be tried first, and as in either case the entire controversy could be adjudicated nothing could remain for trial or determination in the other case.

Aside from all other considerations such a result would be disparaging to the dignity of the Courts. It would create an uncertainty as to the right of a trial by jury which could be dependent entirely upon the discretion or even the caprice of the judges of the different districts in which such causes of action might be pending.

To argue that an equitable action being brought first has a preference in priority of trial or that the preference of trial is a matter of discretion of the trial Court

is entirely to ignore the provisions of the Constitution with respect to jury trials and the statutory provisions now existing with respect to the right of trial by jury. It is also to ignore the spirit and evident purpose of recent legislative acts which require equitable defenses to be tried in law actions by a jury.[5]

As a clear and comprehensive statement of our contention, we quote from the opinion of District Judge Riner in the case of *Smith v. American National Bank*, C. C. A. 8, 89 Fed. 832, at page 838:

> " * * * Section 723 of the Revised Statutes provides that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' This section, it will be noticed, creates a limitation and exception to the jurisdiction of the court by declaring that the case defined in the section is not a suit in equity cognizable under the power conferred by section 629. Congress undoubtedly had the power to define what should be a case in equity by declaring what the common law was which drew the line between the courts of law and equity, and there can be doubt that, when so declared, that declaration was obligatory upon the federal courts by superadding the authority of the legislative department of the government to that of the common law, so as not to leave the line of separation discretionary with the judges. The seventh amendment to the constitution provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.' The effect of this provision is to declare that the right of trial by jury shall depend neither on leg-

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5 §274b of the Judicial Code, Mar. 3, 1915, C. 90, 38 Stat. 956; U. S. C. A. Title 28, Sec. 398.

islative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to secure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law. This provision of the constitution, however, preserves the right of jury trial against any infringement by any department of the government, and section 723 prohibits all courts of the United States from sustaining suits in equity where the remedy is complete at law. Taking this section in connection with section 648 of the Revised Statutes, which provides that 'a trial on issues of fact in the circuit court shall be by jury except in cases of equity and of admiralty jurisdiction, and except as otherwise provided * * * by the next section' (which provides for a waiver of a jury by the parties), it is perfectly clear that congress, by this legislation, intended to preserve to all litigants a right deemed both valuable and sacred. It will be noticed from an examination of this legislation that to bring a case within the exception mentioned in section 723 of the Revised Statutes, two things must concur: (1) It must be a suit of equity jurisdiction; (2) a suit in which a complete remedy cannot be had at law. If any such remedy could be had at law, then it is a suit at common law within the provisions of the seventh amendment to the constitution."

See also, *Griesa v. Mutual Life Ins. Co.*, 169 Fed. 509 (C.C.A. 8) certiorari denied 215 U. S. 600.

Therefore, as heretofore stated, if both types of actions could be pending at the same time, if either one could be tried first, if either one could finally and completely determine the entire controversy, and if the order of trial was a matter of discretion of the trial Court, then the substantial right of trial by jury would neces-

sarily be merely a matter of discretion and not a right guaranteed by the Constitution.

(a) The Petitioner Had a Plain, Adequate, and Complete Remedy at Law.

On September 3, 1932, the day these equity suits were filed, there remained seventeen months and twenty days before the expiration of the contestable period (R. 12). The beneficiaries, respondents here, filed motions to dismiss. Less than six weeks after these suits were filed respondents filed legal actions in the same court to recover on the policies (R. 15).

Thereafter on October 27, 1932, the insurance company filed motions for leave to file supplemental bills in these suits. The motions recited (1) the filing of these equity suits, (2) the filing of motions to dismiss by respondents for the reason, among others, that the company had an adequate remedy at law and that these motions to dismiss were still pending and undetermined, and (3) that the respondents had, on October 11, 1932, filed law actions on the policies in the same court (R. 15). In the supplemental bills the company sought to enjoin the prosecution of the law actions by the respondents until these equity suits had been determined (R. 16).

The insurance company in due time filed in the law actions brought by the respondents, motions to stay proceedings in the law actions until these equity suits were finally determined (R. 21).

On March 3, 1933, at which time the motions to dismiss were still pending and undetermined, the insurance company notified respondents that it intended to present to the Court its application to enjoin prosecution of respondents' legal actions (R. 18).

Thereupon, on March 16, 1933, the motions to dismiss and the application of the insurance company to enjoin prosecution of the law actions came on for hearing before the trial Court (R. 18).

At this time, the insurance company had submitted to the jurisdiction of the Court in the law actions by filing therein motions to stay proceedings. Moreover, the following well-considered cases hold that the legal remedy of the insurance company became plain, adequate and complete notwithstanding the pendency of the equity suits, upon the filing of the law actions within the contestable period by the respondents.

Great Southern Life Ins. Co. v. Burwell, (C.C.A. 5), 12 Fed. (2d) 244, and Certiorari denied 271 U. S. 683.

New York Life Ins. Co. v. McCarthy, (C.C.A. 5), 22 Fed. (2d) 241.

New York Life Ins Co. v. Thompson, (C.C.A. 10), 78 Fed. (2d) 946.

Rohrbach v. Mutual Life Ins. Co., (C.C.A. 8), 82 Fed. (2d) 291.

And see:

Griesa v. Mutual Life Ins. Co., (C.C.A. 8), 169 Fed. 509, Certiorari denied, 215 U. S. 600.

Enelow v. New York Life Ins. Co., 293 U. S. 379.

Adamos v. New York Life Ins. Co., 293 U. S. 386.

The motions to dismiss were considered as leveled at both the original and at the supplemental bills herein, since the application for injunction against the prosecution of the law actions which came on for hearing at the same time is found only in the supplemental bills. The supplemental bills also recite that the law actions have been filed by the respondents (R. 16). Therefore,

the pleadings of the petitioner show upon their face that petitioner had a plain, adequate and complete remedy at law within the contestable period, at the time the motions to dismiss were considered. Under such circumstances it is held that the actions to cancel the policies for fraud will not be entertained in a court of equity.

Cable v. United States Life Ins. Co., 191 U. S. 288.
Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616.
Di Giovanni v. Camden Fire Ins. Co., 296 U. S. 64.
Nichols v. Pacific Mutual Life Ins. Co., (C.C.A. 8, 1936), 84 F. (2d) 896.
Griesa v. Mutual Life Ins. Co., (C.C.A. 8) 169 Fed. 509, Certiorari denied 215 U. S. 600.
Riggs v. Union Life Ins. Co. (C.C. A. 8), 129 Fed. 207.
Rohrbach v. Mutual Life Ins. Co. (C.C.A. 8, 1936), 82 F. (2d) 291.
New York Life Ins. Co. v. Thompson (C.C.A. 10, 1935), 78 F. (2d) 946.

In addition to what is shown by the record in this case, the District Court had the right to take judicial notice of its own records.

Great Southern Life Ins. Co. v. Burwell, 12 Fed. (2d) 244, (C.C.A. 5) and Certiorari denied 271 U. S. 683.
Freshman v. Atkins, 269 U. S. 121, 124, and cases cited.
Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217.
Dimmick v. Tomkins, 194 U. S. 540, 548.
National Fire Ins. Co. v. Thompson, 281 U. S. 331, 336.
Franz v. Buder, 34 Fed. (2d) 353, 356, (C.C.A. 8).

The records in the District Court disclose that the insurance company on September 16, 1933, filed its answers in the law actions brought by these respondents alleging the fraudulent procurement of the policies, thus instituting a contest of the policies for fraud in actions at law. The records also show that respondents replied to these answers on October 10, 1933, whereupon the actions at law upon the policies were *at issue* two months and twenty-three days before the trial of these equity suits in the same court, and four months and thirteen days before the expiration of the contestable period.

The insurance company had thus instituted a contest of the policies in actions at law. A dismissal of the law actions thereafter would not deprive the company of the benefit of that contest.

Cable v. United States Life Ins. Co., 191 U. S. 288, 309.

New York Life Ins. Co. v. Miller, (C.C.A. 8) 73 Fed. (2d) 350.

New York Life Ins. Co. v. Hurt, (C.C.A. 8) 35 Fed. (2d) 92, 96.

Thomas v. Life Ins. Co., 135 Kan. 381, 10 Pac. (2d) 864.

Moreover, the insurance company after the pendency of the law action could plead as a counterclaim or cross-petition the very same cause of action which is set out in the Bill of Complaint to cancel the policy for fraud. By the Kansas Code of Procedure, the dismissal of an action by the plaintiff does not dismiss any counterclaim plead by the defendant. The Revised Statutes of Kansas, 1923, Section 60-3106 provide:

"In any case where a set-off or counterclaim has been presented, the defendant shall have the right

of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear."

See *Northern Life Ins. Co. v. Walker,* 123 Wash. 203, 212 Pac. 277.

(b) Respondents Did Not Waive the Right to Trial by Jury.

The stipulations relating to the order of trial referred to did not purport to waive the respondents' objections contained in the motions to dismiss on account of complainant having an adequate remedy at law.

They purported at most to relate to the order of trial in view of the state of the record in the equity suits and in the law actions, and necessarily, in view of the court having overruled the motions to dismiss, had to do with the convenience or other considerations which might affect the parties in determining which action should be tried first. The fact with regard to whether or not a Court of equity had jurisdiction was then not dependent upon controverted questions of fact. These facts were then of record in the original and supplemental bill which showed that legal actions which gave to the complainants an adequate remedy at law were then pending.

The jurisdiction of a Court of equity upon the grounds that the complainant is without an adequate remedy at law is not a jurisdiction which the parties can by consent or waiver give to a Court of equity.

The *Judicial Code, U. S. C. A.* Title 28, Section 384, provides:

"(JUDICIAL CODE, Section 267.) Suits in equity when not sustainable. Suits in equity shall not be

sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. 723; Mar. 3, 1911, c. 231, 267, 36 Stat. 1163.)

This section has to do with the jurisdiction of the Court and it is evident from it, as well as from the decisions of the Courts, that jurisdiction of an equity court cannot be given by a mere consent and waiver.

Whenever at any stage of the proceedings it appears to a Federal Court in equity that there is a plain, complete and adequate remedy at law, the Court has the duty to dismiss the suit and leave the parties to their legal remedy, even though the point is not raised by the pleadings nor suggested by counsel.

Hipp v. Babin, 19 How. 279.
Oelrichs v. Williams, 15 Wall (82 U. S.) 211.
Lewis v. Cocks, 23 Wall. (90 U. S.) 466.
Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 276.
Phoenix Life Ins. Co. v. Bailey, 13 Wall (80 U. S.) 616.
Sewing Machine Co. v. Benedict, 229 U. S. 481.

The waiver here asserted does not have to do with the appearance or personal privilege of the litigants. It has to do with the giving of jurisdiction to a Court, which it otherwise would not have.

The substantial controversy in its procedural aspect is whether or not the respondents were entitled to a trial by jury, and as the right to a trial by jury is a valuable right, every reasonable assumption should be indulged in against its waiver.

Hodges v. Easton, 106 U. S. 408.
Baylis v. Travelers Ins. Co., 113 U. S. 316.

III.

THE MERITS OF THESE CONTROVERSIES ARE NOT BEFORE THIS COURT.

Petitioner apparently contends in Point D of its brief that this Court should overlook all that took place in the Circuit Court of Appeals and affirm the trial court on the merits. However, in the portion of the finding of fact of the trial court which petitioner has quoted on page 18 of its brief, it has failed to show respondents' objection and exception which were allowed thereto (R. 44) and has failed to show that the Circuit Court of Appeals determined this controversy on procedural and jurisdictional grounds only, and failed to consider the merits of this controversy. *Burnet v. Commonwealth Improv. Co.*, 287 U. S. 413.

That the Circuit Court of Appeals did not determine the merits is not assigned as error in the petition for the writ of certiorari. *Prudence Co. v. Fidelity & Deposit Co.*, 297 U. S. 198.

Furthermore, certiorari was granted upon a petition which was founded solely upon the procedural and jurisdictional controversy here presented, i. e. whether the insurance company has an adequate remedy at law, this is therefore the only question which will be considered by this Court.

Helvering v. Taylor, 293 U. S. 507.
Lloyd v. Elling 297 U. S. 329.
Liberty Oil Co. v. Condon Nat'l Bank, 260 U. S. 235.
Paragraph 2(e) and Paragraph 4 of Rule 27 (formerly Rule 25), of the *Rules of the Supreme Court of the United States.*

CONCLUSION.

The practical and general question of interest which necessarily arises out of this controversy is whether or not these types of controversies are to be made a mere race to the courthouse. In such a race, in view of the common restrictions which require a reasonable time after presentation of proof of death before actions can be filed, and in view of the reasonable desire that beneficiaries may have to avoid the employing of attorneys until a reasonable opportunity is given to the Insurance Companies to pay their claims, it must be apparent that a substantial handicap would be imposed upon the beneficiaries in the assertion of their rights.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 440 and 441.—October Term, 1936.

The American Life Insurance Company, Petitioner, 440 *vs.* Reese Smith Stewart, Junior, and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, Deceased.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
The American Life Insurance Company, Petitioner, 441 *vs.* Ora Inez Stewart and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, Deceased.	

[February 1, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

In these cases suits have been brought for the cancellation of policies of life insurance on the ground of fraud in their procurement, the policies providing that they shall cease to be contestable unless contest shall be begun within a stated time. The question to be determined is the existence, in the circumstances, of a remedy in equity.

On February 23, 1932, petitioner, a Colorado corporation, issued to Reese Smith Stewart, a citizen of Kansas, two policies of life insurance, each for $5,000, one payable to his son, who is a respondent in No. 440, and the other payable to his wife, who is a respondent in No. 441. Each policy contains a provision that it "shall be incontestable, except for non-payment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue." On May 31, 1932, three months and eight days after obtaining the insurance, the insured died, having made in his application fraudulent misstatements, or so the insurer charges, as to his health and other matters material to the risk. On September 3, 1932, the insurer

brought suit to cancel the insurance, a separate suit for each policy, the executrix of the insured being joined as a defendant with the respective beneficiaries. The complaint in each suit refers in a paragraph numbered 8 to the provision that the policy shall be incontestable after the lapse of two years. In the same paragraph it states in substance that the beneficiary may delay the commencement of the action at law till the time for contest has gone by, or, beginning such an action within the period, may afterwards dismiss it and then begin anew. The insurer asks the court to act while yet the barrier is down.

On September 26, 1932, the defendants moved in each suit to dismiss the bill for want of equity. On October 11, 1932, the beneficiaries began actions at law in the same court to recover the insurance. On October 29, the insurer filed its supplemental bills setting forth the pendency of the actions at law, and praying an injunction against their continued prosecution. On July 28, 1933, the District Court denied the motions to dismiss, without passing, however, on motions made by the insurer to enjoin the actions at law. On August 29, a stipulation was signed and filed in each case that "the suit in equity shall be tried" by the court "before said law action is tried, Provided, however, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine", and this stipulation was approved by the court and an order made accordingly. On October 10, 1933, the defendants in each of the equity suits filed their answers to the bills, denying the fraud, admitting the making of the "incontestability clause" as stated in paragraph 8, and as to the other allegations of that paragraph denying any knowledge or information sufficient to form a belief. The answers did not state that the remedy at law was adequate.

Upon the trial of the suits in equity, the District Court found the fraudulent representations charged in the complaints, and decreed the cancellation and surrender of the policies. There was an appeal to the Court of Appeals for the Tenth Circuit, where the decree was reversed, one judge dissenting, the court holding that the insurer had an adequate remedy at law. 80 F. (2d) 600; 85 F. (2d) 791. We granted certiorari to settle an important ques-

tion, and one likely to recur, as to the scope of equitable remedies.

No doubt it is the rule, and one recently applied in decisions of this court, that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 385; *Adamos* v. *New York Life Ins. Co.*, 293 U. S. 386; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 306. That being so, an insurer, though the victim of a fraud, may commonly stand aside and await the hour of attack. But this attitude of aloofness may at times be fraught with peril. If the policy is to become incontestable soon after the death of the insured, the insurer becomes helpless if he must wait for a move by some one else, who may prefer to remain motionless till the time for contest has gone by. A "contest" within the purview of such a contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter. See, e. g., *Killian* v. *Metropolitan Life Ins. Co.*, 251 N. Y. 44, 48; *New York Life Ins. Co.* v. *Hurt*, 35 F. (2d), 92, 95; *Harnischfeger Sales Corp.* v. *National Life Ins. Co.*, 72 F. (2d) 921, 922. Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation. This exception to the general rule has been allowed by the lower federal courts with impressive uniformity.[1] It has had acceptance in the state courts.[2]

[1] From the fourth circuit: Jefferson Standard Life Ins. Co. *v.* Keeton, 292 Fed. 53, 54-56; Jones *v.* Reliance Life Ins. Co., 11 F. (2d) 69, 70; Brown *v.* Pacific Mutual Life Ins. Co., 62 F. (2d) 711, 712; New York Life Ins Co. *v.* Truesdale, 79 F. (2d) 481, 485; Pacific Mutual Life Ins. Co. *v.* Parker, 71 F. (2d) 872, 874. From the fifth circuit: Jefferson Standard Life Ins. Co. *v.* McIntyre, 294 Fed. 886, 888. From the sixth circuit: New York Life Ins Co. *v.* Seymour, 45 F. (2d) 47, 48, 49; Rose *v.* Mutual Life Ins. Co. of New York, 19 F. (2d) 280, 282. From the seventh circuit: Harnischfeger Sales Corp. *v.* National Life Ins. Co., 72 F. (2d) 921, 922, 923. From the eighth circuit: Peake *v.* Lincoln National Life Ins. Co., 15 F. (2d) 303, 305, 306; Lincoln National Life Ins. Co. *v.* Hammer, 41 F. (2d) 12, 17. From the ninth circuit: Massachusetts Bonding & Ins. Co. *v.* Anderegg, 83 F. (2d) 622, 625. From the tenth circuit: New York Life Ins. Co. *v.* Thompson, 78 F. (2d) 946, 947 (semble). From the District of Columbia: Densby *v.* Acacia Mutual Life Ass'n., 78 F. (2d) 203, 206.

[2] New York Life Ins Co. *v.* Regas, 117 Conn. 437; Ebner *v.* Ohio State Life Ins. Co., 69 Ind. App. 32; Aetna Life Ins. Co. *v.* Daniel, 328 Mo. 876; New York Life Ins. Co. *v.* Cobb, 219 Mo. App. 609; New York Life Ins. Co. *v.* Steinman, 103 N. J. Eq. 403; American Trust Co. *v.* Life Ins. Co. of Virginia, 173 N. C. 558; Prudential Ins. Co. *v.* Tanenbaum, 53 R. I. 355.

It was recognized only recently in an opinion of this court, though the facts were not such as to call for its allowance. *Enelow* v. *New York Life Ins. Co., supra,* at p. 384.[3]

The argument is made, however, that the insurer, even if privileged to sue in equity, should not have gone there quite so quickly. Six months and ten days had gone by since the policies were issued. There would be nearly a year and a half more before the bar would become absolute. But how long was the insurer to wait before assuming the offensive, and how was it to know where the beneficiaries would be if it omitted to strike swiftly? Often a family breaks up and changes its abode after the going of its head. The like might happen to this family. To say that the insurer shall keep watch of the coming and going of the survivors is to charge it with a heavy burden. The task would be hard enough if beneficiaries were always honest. The possibility of bad faith, perhaps concealed and hardly provable, accentuates the difficulty. There are statements by judges of repute which suggest a possibility that the contest barrier may stand though the holder of the policy has gone ~~fled~~ to foreign lands. *New York Life Ins. Co.* v. *Panagiotopoulos,* 80 F. (2d) 136, 139. There are statements that it will stand though an action at law, brought within the period, has been dismissed or discontinued later. See *New York Life Ins. Co.* v. *Seymour,* 45 F. (2d) 47, 48; *Harnischfeger Sales Corp.* v. *National Life Ins. Co.,* 72 F. (2d) 921, 925; *New York Life Ins. Co.* v. *Truesdale,* 79 F. (2d) 481, 485, with which contrast *New York Life Ins. Co.* v. *Miller,* 73 F. (2d) 350, 355; *Thomas* v. *Metropolitan Life Ins. Co.,* 135 Kan. 381, 387, and *Powell* v. *Mutual Life Ins. Co.,* 313 Ill. 161, 170. Whether such statements go too far we are not required to determine, for a slight variance in the facts, as, e. g., in the rule prevailing in the jurisdiction where the final suit is brought, may have a bearing on the conclusion. At least in such warnings there are possibilities of danger which a cautious insurer would not put aside as visionary. "Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at

[3] "The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable."

law". *Davis* v. *Wakelee,* 156 U. S. 680, 688. To this must be added the danger that witnesses may disappear and evidence be lost. A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient. *Boyce's Executors* v. *Grundy,* 3 Pet. 210; *Drexel* v. *Berney,* 122 U. S. 241; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1; *Union Pac. R. R. Co.* v. *Weld County,* 247 U. S. 282, 287. "It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party." *Cable* v. *United States Life Ins. Co., supra,* at p. 303. Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. "The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party." *Bank of Kentucky* v. *Stone,* 88 F. 383, 391; cf. *Lincoln National Life Ins. Co.* v. *Hammer,* 41 F. (2d) 12, 16. To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression.

The argument is made that the suits in equity should have been dismissed when it appeared upon the trial that after the filing of the bills, and in October, 1932, the beneficiaries of the policies had sued on them at law. But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296; *Lincoln National Life Ins. Co.* v. *Hammer,* supra; *New York Life Ins. Co.* v. *Seymour,* supra. There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. *Landis* v. *North American Co.,* December 7, 1936, 299 U. S. —. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. *Ibid.* If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. Cf.

Harnischfeger Sales Corp. v. *National Life Ins. Co.*, 72 F. (2d) 921, 922, 923. There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained. *Landis* v. *North American Co.*, *supra*. But respondents, as already indicated, gave that possibility away. They stipulated that the issues in equity should be tried in advance of those at law, and that only such issues, if any, as were left should be disposed of later on. The cases were allowed to stand as if challenge to the suits had been made by a demurrer only. So challenged, they prevail.

The decree should be reversed, and the cause remanded to the Court of Appeals for a consideration of the merits and for other proceedings in accord with this opinion.

Ordered accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.